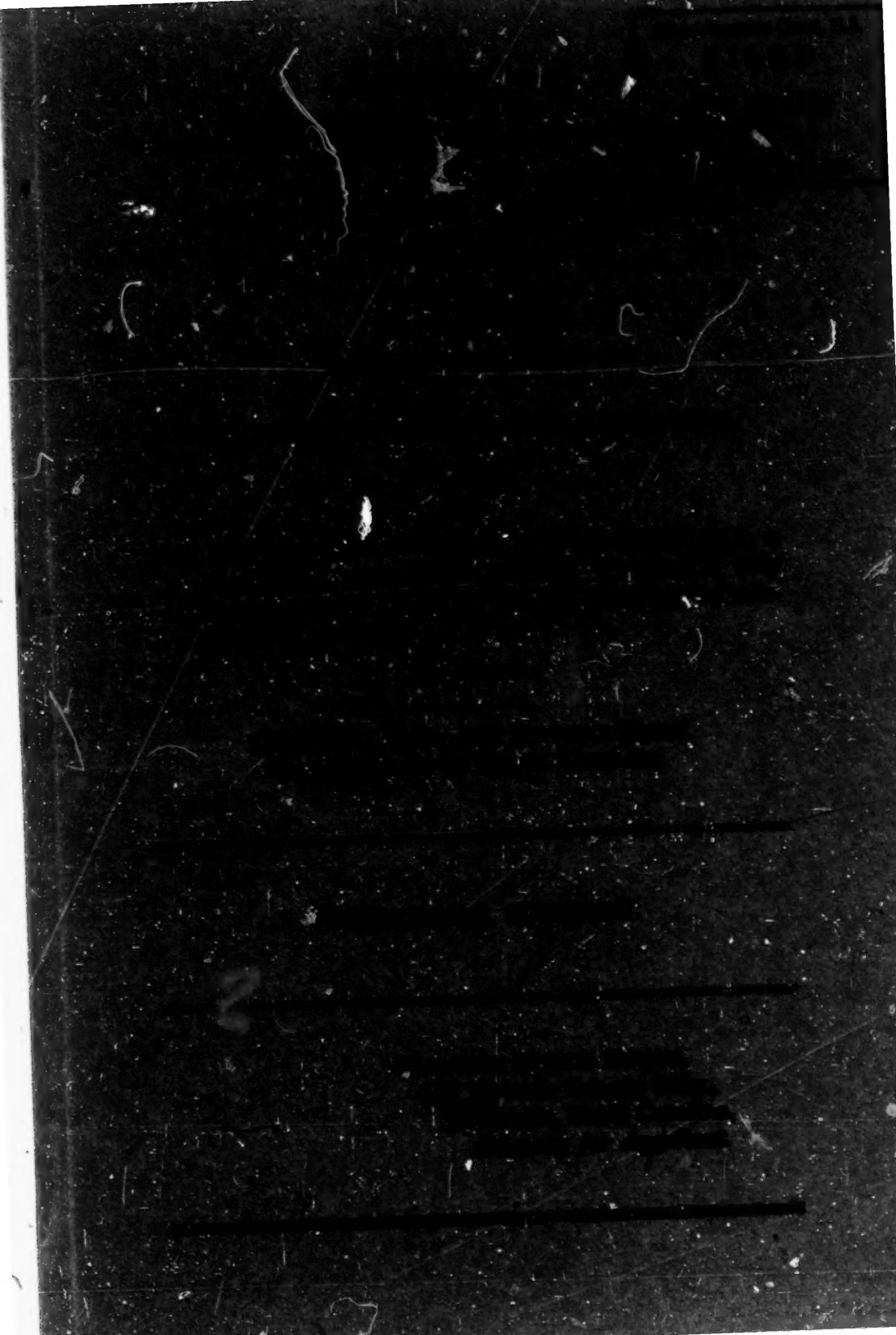

TABLE OF CONTENTS.

Opinions Below 1

Jurisdiction 2

Constitution, Statutes and City Ordinance Involved 6

Questions Presented 6

Statement of the Case 9

The Questions are Substantial Federal Questions:

- Question Number 1 13
- Question Number 2 13
- Question Number 3 15
- Questions Number 4 and 5 and 6 16
- Question Number 7 17
- Question Number 8 17
- Question Number 9 21
- Question Number 10 25
- Question Number 11 27
- Question Number 12 28
- Question Number 13 30

Conclusion 42

Appendix A:

- Tenth Paragraph of Amended Complaint 43
- Report of the Master, Dated January 3, 1963 44
- Exceptions To the Master's Report of January 3, 1963 51
- Exceptions To the Circuit Court Decree of April 2, 1963 56
- Decree and Judgment of the Court of Common Pleas for Greenville County, South Carolina, dated and filed April 2, 1963 53

Opinion and Final Judgment of the Supreme Court of the State of South Carolina, dated and filed December 11, 1963:

1. Majority Opinion and Final Judgment 58

2. Dissent Opinion 68

Appellant's Request for Remand of Case 71

Final Decision and Final Judgment of Supreme Court of State of South Carolina, dated and filed December 11, 1963 72

Appendix B:

Constitution of the United States:

Fourteenth Amendment:

Due Process and Equal Protection 73

Constitution of the State of South Carolina:

Article 5, Section 1 73

Article 5, Section 9 74

Article 5, Section 10 74

Article 16, Section 1 75

Article 16, Section 3 75

Code of Laws of South Carolina, 1962:

Section 10-1409 76

Section 10-2251 76

Section 10-2256 76

Section 10-2260 77

Section 15-101 77

Section 15-642 77

Ordinance of City of Greenville, South Carolina:

Amendatory zoning ordinance passed July 10, 1962 79

TABLE OF AUTHORITIES.

Cases.

Aetna Insurance Co. v. Kennedy, 301 U. S. 389, 57 S. Ct. 809, 81 L. Ed. 1177 33

Antelope, The, 23 U. S. 66, 6 L. Ed. 268 12

Barnes v. District of Columbia, 91 U. S. 440, 23 L. Ed. 440 20

Beard v. Federy, 70 U. S. 478, 18 L. Ed. 88 12

Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200 12

Buscaglin v. Fiddler, 157 Fed. 2d 579 12

Carter v. Texas, 177 U. S. 447, 20 S. Ct. 687, 44 L. Ed. 839 ..... 27, 28

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979 11

City of Gainesville v. Brown-Grummer Investment Co. et al., 277 U. S. 54, 48 S. Ct. 454, 72 L. Ed. 781 33

DeTreville v. Groover, 219 S. C. 313, 65 S. E. 2d 232 ..... 15, 47

Dobbins v. City of Los Angeles, 195 U. S. 223, 25 S. Ct. 18, 49 L. Ed. 169 16

Fairbank v. United States, 181 U. S. 283, 21 S. Ct. 648, 45 L. Ed. 862 25

Federal Deposit Ins. Corp. v. Stienman, 53 F. Supp. 644 12

Glendale v. Coquat, 46 Arizona 478, 52 P. 2d 1178 33

Hickman v. Jones, 76 U. S. 197, 19 L. Ed. 551 ..... 22, 28, 34

Highland Farm Dairy v. Agnew, 300 U. S. 608, 57 S. Ct. 549, 81 L. Ed. 835 36

Jamison v. State of Texas, 318 U. S. 413, 63 S. Ct. 669, 87 L. Ed. 869 4

John P. King Manufacturing Co. v. Augusta, 277 U. S. 100, 48 S. Ct. 489, 72 L. Ed. 801 4

Johnson v. State ex rel. Maxcy, 99 Fla. 1311, 128 So. 853 40

Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 33

Krauss Brothers Lumber Co. v. Mellon, 276 U. S. 386, 48 S. Ct. 358, 72 L. Ed. 620 15

Luther v. Borden, 48 U. S. 1, 12 L. Ed. 581 ..... 21, 28, 29, 30, 31, 34, 36

Mansfield C. & L. M. Railway Co. v. Swan, 111 U. S. 379, 4 S. Ct. 510, 28 L. Ed. 462 34

Martin v. Texas, 200 U. S. 316, 26 S. Ct. 388, 50 L. Ed. 497 24

Miller v. Michigan State Appl. Commission, 296 Mich. 248, 296 N. W. 245 40

Moran v. New Orleans, Illinois, 112 U. S. 69, 5 S. Ct. 38, 28 L. Ed. 653 ..... 5, 17

Murray v. Charleston, 96 U. S. 432, 24 L. Ed. 760 4

Myers v. United States, 272 U. S. 52, 47 S. Ct. 21, 71 L. Ed. 160 ..... 20, 39

Nectow v. City of Cambridge, 277 U. S. 183, 48 S. Ct. 447, 72 L. Ed. 842 ..... 13, 17

New Orleans Water-Works Company v. Louisiana Sugar Refining Company, 125 U. S. 18, 8 S. Ct. 741, 31 L. Ed. 697 ..... 4, 32

New York & M. L. R. Co. v. Winans, 58 U. S. 30, 15 L. Ed. 27 12

O'Donoghue v. United States, 289 U. S. 516, 53 S. Ct. 740, 77 L. Ed. 160 20

Ohio Tel. Co. v. Public Util. Commission, 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093 ..... 12, 33

Osborn v. Nicholson, 80 U. S. 654, 20 L. Ed. 689 18

Pacific States Tel. & Tel. Co. v. State of Oregon, 223 U. S. 118, 32 S. Ct. 224, 56 L. Ed. 377 37

People of State of Illinois ex rel. McCollum v. Board of Education of School District 71, Champaign County, Illinois, 333 U. S. 203, 68 S. Ct. 461 4

Rescue Army v. Municipal Court, 331 U. S. 570, 67 S. Ct. 1420, 91 L. Ed. 1679 40

Robinson v. Robinson, 23 Wash. 2d 93, 159 P. 2d 903 40

Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 5, 17

Springer v. The Government of the Philippine Islands, 277 U. S. 189, 48 S. Ct. 480, 72 L. Ed. 845 **19**, **20**, **21**, **23**, **26**, 35

Springfield v. Carter, 175 Fed. 914 12

State of Florida ex rel. Hawkins v. Board of Control, 350 U. S. 413, 76 S. Ct. 464, 100 L. Ed. 486 41

Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664 24, 27, 28

Talbot v. Myrtle Beach, 222 S. C. 165, 72 S. E. 2d 66 15, 46, 54, 65

U. S. v. Brietling, 61 U. S. 252, 15 L. Ed. 900 41

U. S. v. Ohio Power Co., 353 U. S. 98, 77 S. Ct. 652, 1 L. Ed. 2d 683 41

White v. Hart, 80 U. S. 646, 20 L. Ed. 685 19

Williams v. Bruffy, 96 U. S. 176, 24 L. Ed. 716 4

Wood v. Brush, 140 U. S. 370, 11 S. Ct. 942, 35 L. Ed. 505 **24**, 27, 28, 29

Wright v. Hollingsworth's Lessee, 26 U. S. 165, 7 L. Ed. 96 12

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220 25

Constitutions.

Constitution of the United States:

Article IV, Section 4 8, 9, 17, **19**, 20, 21, 23, 35, 36, 37, 39

Fourteenth Amendment:

Due Process and Equal Protection 2, 3, 6, 7, 8, 9, 10, 11, 13, 15, 16, 17, 25, 27, 28, 56

Constitution of the State of South Carolina:

Article 1, Section 14 **35**, 37, 38

Article 3, Section 1 **35**, 37, 38

Article 4, Section 1 **36**, 37, 38

Article 5, Section 1 **18**, 36, **37**, 38, 73

Article 5, Section 1 **18**, 36, **37**, 38, **73**

Article 5, Section 2 6, 7, 17, 23, 35, 37, 38, 40
Article 5, Section 4 14
Article 5, Section 9 38, 74
Article 5, Section 13 6, 7, 17, 18, 23, 35, 37, 38, 40
Article 16, Section 1 35, 75
Article 16, Section 3 35, 75

Statutes.

Code of Laws of South Carolina, 1962:
Section 10-401 2, 3
Section 10-631 2
Section 10-691 2
Section 10-1409 3, 6, 13, 66, 68, 69, 76
Section 10-2251 32, 76
Section 10-2256 32, 76
Section 10-2260 32, 77
Section 15-101 6, 7, 17, 18, 35, 37, 38, 40, 77
Section 15-642 77
Ordinance of City of Greenville, South Carolina:
Amendatory zoning ordinance passed July 10, 1962 6, 7, 10, 13, 17, 22, 28, 42, 46, 58, 79
Comprehensive Zoning Plan Ordinance, 1952 13

Rules of Court.

Supreme Court of the United States:
Rule 16, par. 4 41

Textbooks.

Appeal and Error, 4 A. C. J. S. Section 1212 12
Constitutional Law, 16 C. J. S. Section 99:
Note 54 23
Note 54.15 23
Evidence, 31 C. J. S.:
Section 13 12
Section 48 26
The Book of the States, 1954-1955 Edition, page 436 39

In the Supreme Court of the United States

No. .

OCTOBER TERM, 1963.

BOB JONES UNIVERSITY, INC., a Corporation,
Appellant,

v.

THE CITY OF GREENVILLE, SOUTH CAROLINA, a Municipal Corporation, GERALD W. SHAW, City Manager, and JAMES H. WARD, Building Commissioner, of said City,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

OPINIONS BELOW.

The Report of the Master, dated January 3, 1963, is not officially or unofficially reported, but it is printed in Appendix A hereto, pages 44-51.

The Opinion, Judgment, or "Decree" — as it is entitled, of the trial court — the Court of Common Pleas for Greenville County, dated April 2, 1963, is not officially or unofficially reported, but it is printed in Appendix A hereto, pages 53-56.

The Opinion of the Supreme Court of the State of South Carolina, which consists of a Majority Opinion and a Dissenting Opinion, is reported in S. C. , and in 133 S. E. 2d 843. This Opinion, including both the Majority and Dissenting Opinions, is printed in Appendix A hereto, pages 58-68.

In South Carolina, the Opinion of the State Supreme Court, and in this case the Majority Opinion, serves as and

constitutes the Final Judgment of that Court. See the Certificate of the Clerk of the said Court to the Transcript of Record on this Appeal. Therefore, said Majority Opinion is the Final Judgment, and it is appealed from in this Appeal to the Supreme Court of the United States.

JURISDICTION.

This is a suit in equity, brought by Bob Jones University, Inc., hereinafter called the appellant, but styled plaintiff in the trial court, against the City of Greenville, South Carolina, a municipal corporation, and Gerald W. Shaw, City Manager, and James H. Ward, Building Commissioner, of said city, hereinafter called appellees, but styled defendants in the trial court, which was the Court of Common Pleas for Greenville County, South Carolina. The suit was commenced on July 30, 1962, by the service upon appellees (defendants in that court) of a summons as provided for by Section 10-401, Code of Laws of South Carolina, 1962. A complaint was served with said summons upon the said appellees (defendants in that court), as provided for by Section 10-631, of said code. Thereafter, and within twenty days, appellant served upon appellees an amended complaint, as provided for by Section 10-691, of said code. The answer of the appellees (defendants in the trial court) to the original complaint was permitted to stand as to the amended complaint.

The purpose of this suit by appellant as aforesaid was to have an amendatory zoning ordinance passed by the City of Greenville, South Carolina, on July 10, 1962, declared null and void, and to restrain and enjoin appellees from enforcing the same on the grounds that the said amendatory zoning ordinance deprived appellant of rights and property without due process of law, and denied to it the equal protection of the laws, in violation of the Due Process of Law, and the Equal Protection of the Laws, Clauses in the Fourteenth Amendment to the Constitution of the United States. The said amendatory zoning ordinance re-zoned certain real property, known as the Wilson property, adjacent to appellant's college campus, from

residential to retail shopping center classification. Both the original and the amended complaints attacked the said amendatory zoning ordinance on the said federal constitutional grounds. See Excerpt in Appendix A, page 43.

After issues joined as aforesaid, the trial court referred the case to the Master in Equity for Greenville County, South Carolina, to take the testimony and report the same to the trial court, together with his findings of fact and conclusions of law, under authority of Section 10-1409, Code of Laws of South Carolina, 1962, printed in Appendix B hereto.

On January 3, 1963, the Master transmitted the said testimony to the said trial court, and dated and filed his Report, in which his findings and conclusions were against appellant on all of the issues joined in said pleadings.

Under authority of Section 10-1412, Code of Laws aforesaid, appellant served upon appellees and filed its exceptions to the Master's said Report, on the grounds that appellant was being deprived of rights and property without due process of law, and was being denied the equal protection of the Laws, in violation of the Due Process of Law, and the Equal Protection of the Laws, Clauses of the Fourteenth Amendment to the Constitution of the United States.

On April 3, 1963, the presiding judge of the trial court, the Honorable James Hugh McFaddin, filed his Decree of that date, overruling appellant's exceptions, confirming the said Report of the Master, and dismissed the complaint and the suit.

The Master's Report aforesaid, and the above mentioned Decree, are printed in Appendix A hereto.

Under authority of Sections 7-401, and 15-122, 123, Code of Laws aforesaid, appellant gave Notice of Intention to Appeal to the Supreme Court of South Carolina from the said Decree and judgment of the trial court, and by exceptions which preserved and presented appellant's constitutional grounds aforesaid, it duly appealed to the said State Supreme Court, which on the 11th day of De-

cember, 1963, entered its decision and final judgment bearing date of December 11, 1963, whereby it affirmed the judgment and Decree of the trial court, by a division of the Court — four justices being for affirmance, and one justice against affirmance. Both the Majority Opinion and the Dissent Opinion are printed in Appendix A hereto.

Under the rules and practice of the Supreme Court of the State of South Carolina, the decision or opinion of the Court serves as and constitutes the Final Judgment of the Court. Therefore, in the case at bar, the Majority Opinion of the Court is the final judgment of said Court in this case.

In the appeal to the Supreme Court of South Carolina, appellant was styled appellant, and the appellees herein were styled respondents.

On March 5, 1964, the Notice of Appeal to the Supreme Court of the United States, from the said decision and final judgment aforesaid of the Supreme Court of the State of South Carolina, was served upon counsel for appellees, who thereon accepted service thereof, and said Notice of Appeal was thereafter, on the said 5th day of March, 1964, filed in the Office of the Clerk of the Supreme Court of the said State of South Carolina.

The jurisdiction of the Supreme Court of the United States to review the final decision and final judgment of the Supreme Court of the State of South Carolina in this case, on and by this appeal therefrom, is conferred by Title 28, United States Code, Section 1257 (2). This jurisdiction is sustained: (1) Generally by *Williams v. Bruffy*, 96 U. S. 176, 24 L. Ed. 716; (2) As to a City Ordinance — the Ordinance Amending the zoning classification of the Wilson property — *Murray v. Charleston*, 96 U. S. 432, 440, 24 L. Ed. 760; *New Orleans Water Works Co v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 8 S. Ct. 741, 748, 31 L. Ed. 607; *John P. King Manufacturing Co. v. Augusta*, 277 U. S. 100, 48 S. Ct. 489, 72 L. Ed. 801; *Jamison v. State of Texas*, 318 U. S. 413, 63 S. Ct. 669, 87 L. Ed. 869; and (3) As to Section 10-1409, Code of Laws of South Carolina, 1962 — *People of State of*

Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign County, Illinois, 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 648.

Furthermore, this Court is the final authority on the question whether a state statute — *Shelley v. Kreamer*, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, or a municipal ordinance — *Moran v. New Orleans, Illinois*, 112 U. S. 69, 5 S. Ct. 38, 28 L. Ed. 653 — violates the Constitution of the United States. And the investiture of authority in any public body, in and of itself, necessarily carries with it the jurisdiction to act.

Appellant relies upon the foregoing to sustain the jurisdiction of this Court on this Appeal.

This Court having jurisdiction of this appeal by reason of the federal substance in the issues raised in the state courts below, and which issues are made the subject-matter of the first seven questions stated in the Notice of Appeal to this Court, appellant raised, for the first time, other questions in this appeal, because: (1) Since they relate to the validity of the state's system of electing or appointing judges and justices, the state courts were without jurisdiction to hear and determine them; and (2) certain state statutes hereinafter mentioned, barred the raising of those issues in the state court. Since this point goes to the jurisdiction of this Court to hear said new questions only, rather than to the jurisdiction to hear this appeal generally, the jurisdiction of this Court to hear said new questions is made the subject of, and is discussed in, Question Number 13. However, mention will be made here of the fact that when a state strips its courts of jurisdiction to hear issues relative to which federal constitutional rights might be interposed, and if this Court cannot consider those issues on the appeal to this Court, then a state can at will deprive a party of the benefit of the United States Constitution and of the amendments thereto.

CONSTITUTION, STATUTES AND ORDINANCE INVOLVED.

The following constitutional sections, statutes and city ordinance are involved in this appeal.

South Carolina State Constitution:

Article 5, Section 2

Article 5, Section 13

Code of Laws of South Carolina, 1962:

Section 10-1409

Section 15-101

City of Greenville, South Carolina, Ordinance:

Passed July 10, 1962, re-zoning the Wilson property.

QUESTIONS PRESENTED.

1. Was the amendatory zoning ordinance passed by the City Council of Greenville, South Carolina, on July 10, 1962, void for violation of the Due Process of Law, and the Equal Protection of the Laws, Clauses in the Fourteenth Amendment to the Constitution of the United States?

2. Was Section 10-1409, Code of Laws of South Carolina, 1952 (1962), as construed and interpreted by the South Carolina State Supreme Court, void for violation of the Due Process of Law, and the Equal Protection of the Laws, Clauses in the Fourteenth Amendment to the Constitution of the United States?

3. Did the refusal of the South Carolina State Supreme Court to remand this case back to the trial court with instructions to put the record in the condition required by law, that is, identify what evidence had been ruled out and what evidence had been ruled in, violate the Due Process of Law, and the Equal Protection of the Laws, Clauses in the Fourteenth Amendment to the Constitution of the United States?

4. Was the amendatory zoning ordinance of the City of Greenville, South Carolina, passed on July 10, 1962, under and pursuant to the police power of said State, never-

theless subject to the prohibitions and limitations contained in the Fourteenth Amendment to the Constitution of the United States?

5. Did the failure and refusal of the South Carolina State Supreme Court to consider and determine whether the amendatory zoning ordinance of the City of Greenville, South Carolina, passed on July 10, 1962, was unconstitutional, in and of itself, violate the Due Process of Law, and the Equal Protection of the Laws, Clauses in the Fourteenth Amendment to the Constitution of the United States?

6. Did the failure and refusal of the South Carolina State Supreme Court to hold that the amendatory zoning ordinance of the City of Greenville, South Carolina, passed on July 10, 1962, was invalid, unconstitutional, null and void, deprive appellant of rights and property, and deny to it the equal protection of the laws, in violation of the Due Process of Law, and the Equal Protection of the Laws, Clauses in the Fourteenth Amendment to the Constitution of the United States?

7. Did the South Carolina State Supreme Court, by rendering final judgment against appellant, deprive it of rights and property, and deny to it the equal protection of the laws, in violation of the Due Process of Law, and the Equal Protection of the Laws, Clauses in the Fourteenth Amendment to the Constitution of the United States?

8. Are Sections 2 and 13, of Article 5, of the South Carolina State Constitution, and Section 15-101, Code of Laws of South Carolina (1952), 1962, a system for the election or appointment of judges and justices, unconstitutional, null and void, as not separating the characteristic powers of government, and in vesting non-legislative powers in the General Assembly, and destroying the equality of the state governmental branches, and making the judicial department subservient to the legislative department, through the election or appointment by the General Assembly of the judges and justices of the judicial department for limited terms of office, and being therefore in violation

of Article 4, Section 4, of the Constitution of the United States?

9. Did the party who passed the Decree of April 2, 1963, as Judge of the trial Court, and did those who passed the Majority Opinion and Final Judgment of December 11, 1963, as Justices of the Supreme Court of the State of South Carolina, have any right, title or color of claim, de jure, de facto, or otherwise, in or to the respective offices they assumed to fill, since they must base all rights, title, claim or color thereto, upon the election or appointment thereto by the General Assembly of the State of South Carolina, which had no power as a matter of law to make such appointments or elections, and in view of the wrongful and unlawful discrimination practiced by the said General Assembly in making elections or appointments thereto?

10. Has the General Assembly of the State of South Carolina practiced wrongful and unlawful discrimination in the election or appointment of judges and justices to the State Circuit and State Supreme Courts of South Carolina, and was that practice in operation, force and effect when the trial judge who passed the Circuit Court Decree of April 2, 1963, and when the justices who passed the Majority Opinion and Final Judgment in the Supreme Court of South Carolina on December 11, 1963, were elected or appointed by the General Assembly of said State to the respective offices they assumed to fill?

11. Did appellant have the right to a lawful trial, hearing and determination of this case, and did it get such a trial when the trial judge, and the Supreme Court justices who passed the Majority Opinion and Final Judgment, had been unlawfully elected or appointed to the respective offices they assumed to fill, in that the said General Assembly had no elective or appointive power, as a matter of law, and practiced wrongful and unlawful discrimination in the said elections and apointments, and was appellant deprived of rights and property, and denied the equal protection of the laws, in violation of the Due Process of Law, and the Equal Protection of the Laws, Clauses in

the Fourteenth Amendment to the Constitution of the United States?

12. Was the Decree of April 2, 1963, passed in the trial court, and the Majority Opinion Decision and Final Judgment passed on December 11, 1963, by a majority of the justices in the Supreme Court of the State of South Carolina, null and void, or voidable, in that the judge and justices passing the same respectively had no valid, legal or recognizable right, title, claim or color to the offices they assumed to fill, since they had been elected or appointed thereto by the General Assembly of said State, which action was non-legislative and beyond the power of the General Assembly to perform, as a matter of law, and which on its face violated Article 4, Section 4, of the United States Constitution, and in said election or appointment of said Judge and justices, the said General Assembly had practiced wrongful and unlawful discrimination, all of which deprived appellant of rights and property without due process of law, and denied to it the equal protection of the laws, in violation of the Due Process of Law, and the Equal Protection of the Laws, Clauses in the Fourteenth Amendment to the Constitution of the United States?

13. Does appellant have the right to raise Questions Numbers 8 through 12, both inclusive, for the first time on this appeal?

STATEMENT OF THE CASE.

Transcript of Record references herein are to folios (F.) in the agreed Transcript of Record which is Item Number (1) in the Notice of Appeal to the Supreme Court of the United States in this case.

Appellant came to Greenville County, South Carolina, in October, 1947 (F. 60), and acquired about 150 acres of land in said county (F. 61), and by 1961, had spent about $15,000,000.00 in the construction of buildings on its campus (Ff. 7-8); on January 1, 1949, the area including appellant's said property was annexed to the City of Greenville, South Carolina (F. 129), and the area was zoned residential by the Comprehensive Zoning Ordinance of said

city passed on August 19, 1952 (F. 130), and appellant, thinking the area would remain residentially zoned, placed important buildings near White Oak Drive (F. 77) — that was near the Wilson property, also so zoned residential, see black area bounded by Karen Drive, Wade Hampton Boulevard, White Oak Drive, and red line, on Plaintiff's Exhibit 8 on page 213 of the said Transcript of Record. The zoning classification of the Wilson property, bounded as aforesaid, was changed from residential to retail shopping center property by the amendatory zoning ordinance of the City of Greenville, passed July 10, 1962, and printed in Appendix B hereto. See also, Ff. 87 and 88. 174 residents of the Wilson property community petitioned the Greenville City Council in opposition to said re-zoning (F. 746), and one witness testified that a shopping center on the Wilson property, if operated at its worst, could damage the appellant's property $5,000,000.00 — (F. 148).

Appellant commenced this suit or action against appellees on July 30, 1962, by the service of a summons and complaint on appellees, and thereafter it served upon said appellees an amended complaint (F. 1). The amended complaint commences with F. 6 and ends with F. 32. Appellant alleged in its amended complaint that said ordinance was illegal, invalid and null, because it deprived appellant of its rights and property without due process of law, and denied to appellant the equal protection of the laws, in violation of the Due Process of Law, and the Equal Protection of the Laws, Clauses in the Fourteenth Amendment to the Constitution of the United States — Ff. 29-30, and asked the court to so declare the said amendatory zoning ordinance, and to enjoin its enforcement — F. 31. See Appendix A, page 43.

The case was referred to the Master in Equity to take the testimony and report the same to the trial court, together with his findings of fact and conclusions of law (F. 3), and the Master dated and filed his finding and conclusion Report on January 3, 1963 (F. 3), holding against the contentions of appellant. The Report commences with Folio 737 and ends with Folio 773. Appellant excepted to this Report (Ff. 774-815), reasserting the

violation of the Due Process of Law, and the Equal Protection of the Laws, Clauses in the Fourteenth Amendment to the Constitution of the United States — Ff. 787, 791, 793, 794, 798, 799, 804 and 814. Some of the Exceptions are printed in Appendix A, pages 51-53.

By a decision and Decree dated and filed April 2, 1963, the trial court overruled the said exceptions and confirmed the said Master's Report, gave judgment against appellant, and dismissed its said amended complaint — Ff. 817-883. The trial court did not consider appellant's constitutional questions, but that did not defeat appellant's rights to invoke the same. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979. See Appendix A, page 53.

Appellant appealed to the Supreme Court of the State of South Carolina from the said decision, Decree and judgment of the said trial court, on exceptions commencing with Folio 889 — and ending with Folio 909. By Exception 7 (d) appellant reasserted the Due Process of Law objection (F. 906); raised the Due Process of Law, and the Equal Protection of the Laws, in respect to the Master's blind method of ruling on the evidence (F. 892), and to the Master's holding that the ordinance was beyond the operation of said clauses in the United States Constitution (F. 899), and that all of that violated the said Due Process of law and the Equal Protection of the Laws, Clauses in the Fourteenth Amendment to the Constitution of the United States. Some of the Exceptions are printed in Appendix A, pages 56-57.

The Supreme Court of the State of South Carolina affirmed the said decision, Decree and judgment of the said trial court, and appellant has appealed from the decision and final judgment of the said South Carolina State Supreme Court to the Supreme Court of the United States, and by questions in its Notice of Appeal to this Court, it has brought the said federal constitutional issues to this Court for decision.

Appellant has also raised in this Court other United States Constitutional questions, not raised in the state courts below, because said state courts did not have juris-

diction to hear and determine them. These new questions do not depend upon supporting citations from the records below, because they are based on facts of which courts take judicial notice. Allegations of such facts have no proper place in the pleadings — *Wright v. Hollingsworth's Lessee*, 26 U. S. 165, 7 L. Ed. 96; and proof of such facts have no proper place in the evidence — *The Antelope*, 23 U. S. 66, 6 L. Ed. 268; *New York & M. L. R. Co. v. Winans*, 58 U. S. 30, 15 L. Ed. 27.

Since the new questions relate to legislators, judges and lawyers, mention will be made that courts take judicial notice of: (1) the names of attorneys and when they were admitted to practice — *Federal Deposit Ins. Corp. v. Stieneman*, 53 F. Supp. 644; *Buscaglin v. Fiddler*, 157 F. 2d 579; (2) the election and resignation of legislative officers — *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200; and (3) important officeholders in general — *Springfield v. Carter*, 175 Fed. 914. Also, courts take judicial notice of matters of common knowledge — *Ohio Tel. Co. v. Public Utilities Commission*, 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093, and matters of common knowledge to a profession — the legal profession in the case at bar — *Beard v. Federy*, 70 U. S. 478, 18 L. Ed. 88. Who the judges, justices and members of the General Assembly were and are, are matters of common knowledge.

An appellate court takes judicial notice of all matters of which the original court could have properly taken judicial notice. Evidence, 31 C. J. S. Section 13. And such matters need not be incorporated in the record on appeal. Appeal and Error, 4 A C. J. S. Section 1212.

THE QUESTIONS ARE SUBSTANTIAL FEDERAL QUESTIONS.

This case brings before this Court important and serious challenges by various agencies of the State of South Carolina to the Constitution of the United States, and to the amendments thereto. They will be discussed in the order that they are propounded in the Notice of Appeal herein.

Question Number 1

The amendatory zoning order of the City of Greenville, South Carolina, passed on July 10, 1962, is repugnant to the Due Process of Law, and the Equal Protection of the Laws, Clauses in the Fourteenth Amendment to the Constitution of the United States, for the reason that it deprives appellant of its property without due process of law, and denies it the equal protection of the laws. The ordinance is printed in Appendix B hereto, page 79.

By the Comprehensive Zoning Ordinance of Greenville, passed on August 19, 1952, the re-zoned property was classified as residential. Relying upon the stability of the original ordinance, appellant spent millions of dollars in building its college campus, putting dormitories and library near the re-zoned Wilson property. The amendatory zoning ordinance re-classified said property into a retail shopping center, and since it adjoins appellant's campus, it will cause immense damage to appellant's property, without promoting the public health, safety, morals or the general welfare, and benefiting only the owners of the re-zoned property. In such case, the amendatory ordinance is void, being violative of the due process and equal protection of the law clauses aforesaid. *Nectow v. City of Cambridge*, 277 U. S. 183, 48 S. Ct. 447, 72 L. Ed. 842.

Question Number 2

This case was referred by the trial court to the Master to take the testimony and report it to the trial court, together with his findings of fact and conclusions of law. This brought the case within the operation of Section 10-1409, Code of Laws of South Carolina, 1962, relating to the powers and duties of Masters. This section of the code is printed in Appendix B hereto, page 76. It authorizes and requires the Master to rule on the admissibility of the evidence, and requires him to separately report the evidence he holds incompetent and rules out, from that which he holds competent and rules in. This statutory law requires him to take all testimony offered. Without separately reporting the evidence he ruled out, from that he ruled in,

and without providing any other means by which the one could be separated from the other, the Master ruled as follows, in his Report:

> "I find that much testimony by both parties was irrelevant and incompetent. Both parties agreed that I must take all testimony, but that I had the right to consider only such testimony as I thought proper. I have done this, and, consequently, a large portion of the testimony and exhibits have been sifted as the 'chaff from the wheat.'" F. 746.

Appellant duly excepted to this method of reporting, but the trial court overruled the Exception thereto, holding in its Decree of April 2, 1963, as follows:

> "It would accomplish no useful purpose to go through the record and point out that which is irrelevant or incompetent and that which is competent." F. 825.

Appellant was thus deprived of its right to except to (a) the ruling out of much of its evidence, and (b) the ruling in of much of appellees' evidence, because the Master's blind method of ruling on the evidence made specific exceptions impossible. With the record in this condition, how could the trial court know whether to confirm or overrule the Master's Report, which was against appellant? The trial court blindly confirmed that report. And how could the South Carolina Supreme Court know whether to affirm or reverse the trial court's Decree? But it blindly affirmed that Decree, which too was against appellant.

The trial court failed in one of its primary purposes — that of determining and making known what evidence was for and against the parties.

The South Carolina Supreme Court failed in its purpose, for among the powers and duties imposed upon said Court by Article 5, Section 4, of the South Carolina State Constitution, is this:

> "And said Court shall have appellate jurisdiction only in cases of chancery, and in such appeals they shall review the findings of fact as well as the law, . . ."

How could that Court "review the findings of fact" — and this was a chancery case — when it could not possibly know what the evidence was?

Appellant was denied the right to be heard on the competency of its evidence, and on the incompetency of appellees' evidence, and of the right to have the case decided on the basis of evidence. This deprived appellant of rights and property without due process of law, in violation of the Due Process of Law Clause in the Fourteenth Amendment to the Constitution of the United States.

This also denied to appellant the equal protection of the laws, in violation of the Equal Protection of the Laws Clause in the Constitutional Amendment aforesaid, because litigants in other chancery — equity — cases got the findings of fact reviewed. *DeTreville v. Groover*, 219 S. C. 313, 65 S. E. 2d 232; *Talbot v. Myrtle Beach*, 222 S. C. 165, 72 S. E. 2d 66.

QUESTION NUMBER 3

The State Supreme Court deprived appellant of rights and property, and denied to it the equal protection of the laws, in violation of the Due Process of Law and the Equal Protection of the Laws Clauses in the Fourteenth Amendment to the Constitution of the United States, by refusing appellant's request on page 58 of its Argument, to remand the case to the trial court with instructions to put the record in the condition required by law. The law required the record to disclose what evidence of each party had been ruled out, and what evidence of each party had been ruled in. This portion of appellant's argument is printed in Appendix A hereto, page 71.

The principle of law laid down in *Krauss Brothers Lumber Company v. Mellon*, 276 U. S. 386, 48 S. Ct. 358, 72 L. Ed. 620, should be applicable here. In that case this Court said:

> "If a motion is made in the trial court to take the case from a jury, or other fact-finding tribunal, and direct a verdict or give judgment on the ground that, as a matter of law, only one verdict or judgment can be

reached, it must appear that in the bill of exceptions is contained all the evidence actually adduced before the trial court. It has always been ruled in such a case that, if the bill of exceptions does not contain all the evidence, it will be presumed that the evidence omitted was sufficient to justify a refusal to grant the motion." And many supporting cases are cited.

In the case at bar, there was no contention that any essential element of appellant's case lacked supporting evidence, but the Master held that the case was not proven "within the degree required under our law." F. 760.

There is no way of knowing how badly the strength of appellant's evidence was damagd by the wrongful ruling out of unidentified portions of its evidence, or how much appellees' case was strengthened by the inclusion of evidence that should have been ruled out.

QUESTIONS NUMBER 4 AND 5 AND 6

The Master held that the passage of zoning ordinances is the exercise of the police power of the state, and that

"This disposes of the contention of Plaintiff as contained in its Complaint with respect to any inhibition that may be interposed by the State and Federal Constitution." F. 753.

In *Dobbins v. City of Los Angeles*, 195 U. S. 223, 25 S. Ct. 18, 49 L. Ed. 169, the Court had before it a zoning ordinance, against which the Equal Protection of the Laws Clause of the Fourteenth Amendment to the Constitution of the United States had been interposed. And this Court said:

"The question of constitutional law to which we have referred (the equal protection of the laws) cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, . . ."

Thus there was disagreement among the authorities, and the trial court accepted the view of the Master, because it confirmed his Report, and so did the South Carolina State Supreme Court, because it affirmed the Decree of

the trial court, thereby overruling the Supreme Court of the United States on a United States Constitutional question. This they cannot do. *Shelley v. Kreamer*, supra; *Moran v. New Orleans, Ill.*, supra.

Appellant was deprived of rights and property without due process of law, and denied the equal protection of the laws, in violation of the Due Process of Law and the Equal Protection of the Laws Clauses in the Fourteenth Amendment to the Constitution of the United States, in that:

(a) Appellant was denied the right to be heard on the federal constitutionality of the Greenville City amendatory zoning ordinance passed July 10, 1962; and

(b) The said unconstitutional ordinance — *Cf. Nectow v. City of Cambridge*, supra — escaped condemnation.

QUESTION NUMBER 7

All of the illegalities mentioned in the preceding questions were cumulative, and if any one question taken alone is insufficient to call for the reversal of the State Supreme Court decision and final judgment here on appeal, all of these illegalities combined should be sufficient therefor.

QUESTION NUMBER 8

Section 2, of Article 5, of the South Carolina State Constitution, and Section 15-101, Code of Laws of South Carolina, 1962, purporting to empower the South Carolina State Legislature to elect or appoint the justices of the State Supreme Court, and Section 13, of Article 5, of the said State Constitution, attempting to do the same in regard to Circuit Court Judges, are all null and void, since they attempt to vest non-legislative powers of great importance upon the State legislature, in violation of Article 4, Section 4, of the Constitution of the United States.

Said Section 2 of said State Constitution reads:

"The Supreme Court shall consist of a Chief Justice and four Associate Justices, any three of whom shall constitute a quorum for the transaction of business.

The Chief Justice shall preside, and in his absence the senior Associate Justice. They shall be elected by a joint viva voce vote of the General Assembly for the term of ten years, and shall continue in office until their successors shall be elected and qualified, and shall be so classified, that one of them shall go out of office every two years."

Section 15-101, of the Code aforesaid, is a statute in like words to the constitutional provision just quoted, and it is printed in Appendix B hereto, page 77.

Section 13, of Article 5, of the said State Constitution reads:

"The State shall be divided into as many Judicial Circuits as the General Assembly may prescribe, and for each Circuit a Judge shall be elected by joint viva voce vote of the General Assembly, who shall hold his office for a term of four years; and at the time of his election he shall be an elector of a County of, and during his continuance in office he shall reside in, the Circuit of which he is Judge. The present Judges of the Circuit Courts shall continue in office until the expiration of the term for which they were elected, and should a new division of the Judicial Circuits be made, shall be the Judges of the respective Circuits in which they shall reside after said division."

The above two sections of the South Carolina State Constitution cover all of the courts of any importance in the State of South Carolina, because the judicial system of said State is established by Section 1, Article 5, of said State Constitution, and the pertinent part thereof reads as follows:

"The Judicial power of this State shall be vested in a Supreme Court, in Two Circuit Courts, to wit: A Court of Common Pleas having civil jurisdiction and a Court of General Sessions with criminal jurisdiction only. . . ." For the full text, see Appendix B hereto, page 73.

State Constitutions that contravene the Constitution of the United States are null and void. *Osborn v. Nichol-*

son, 80 U. S. 654, 20 L. Ed. 689; *White v. Hart*, 80 U. S. 646, 20 L. Ed. 685. A fortiori, state statutes that are in contravention of the United States Constitution are void too.

The pertinent part of Article 4, Section 4, of the United States Constitution reads:

> "The United States shall guarantee to every State in the Union a Republican Form of Government. . . ."

This Court has held that a Republican Form of Government is one wherein there are three departments — executive, legislative and judicial, each separate and distinct from the other, and each vested with its characteristic powers, and the exercise of which powers is excluded from the other departments. These elements are vital and basic. In *Springer v. The Government of the Philippine Islands*, 277 U. S. 189, 48 S. Ct. 480, 72 L. Ed. 845, this Court said:

> "the rule established by the American Constitutions, both state and federal, divides the government into three separate departments — the legislative, executive and judicial. Some of our state Constitutions expressly provide in one form or another that the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other. Other Constitutions, including that of the United States, do not contain such an express provision. But it is implicit in all, as a conclusion logically following from the separation of the several departments. See *Kilbourne v. Thompson*, 103 U. S. 168, 190, 191, 26 L. Ed. 377. And this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital — not merely a matter of governmental mechanism."

The exclusion of the exercise of governmental powers appropriate to one branch of the government from the other branches thereof, prohibits state legislatures from exercising non-legislative functions. And the election or appointment of judges and justices to judicial offices is

a non-legislative function, under and forbidden by Article 4, Section 4, of the United States Constitution. In *Myers v. United States*, 272 U. S. 52, 47 S. Ct. 21, 71 L. Ed. 160, this Court quoted with approval what Mr. Madison said on that point, namely:

> "The powers relative to offices are partly legislative and partly executive. The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the legislative power ceases. They ought to have nothing to do with designating the man to fill the office."

In *Springer v. The Government of the Philippine Islands*, supra, this Court said:

> "Legislative power, as distinguished from the executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement."

In *Barnes v. District of Columbia*, 91 U. S. 440, 23 L. Ed. 440, this Court stated how State Supreme Court judges can be elected, and what was there said relative to them, should apply with equal force to State Circuit judges. In that case this Court said:

> "The judges of the Supreme Court of a State may be appointed by the Governor with the consent of the Senate, or they may be elected by the people."

But the judges of said courts cannot be elected or appointed, for limited terms of office, by one of the other departments of government alone without the judicial department becoming subservient to the electing or appointing department, and that destroys the equality and independent features required to exist between the departments. That is shown by the following quotation taken from *O'Donoghue v. United States*, 289 U. S. 516, 53 S. Ct. 740, 77 L. Ed. 1356, to wit:

> "the Declaration of Independence, which, among the injuries and usurpations recited against the King of Great Britain, declared that he had 'made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.' "

The above complaint is necessarily true, because the party who can make or break another is always superior to the party who can be made or broken. And this is true in the case at bar, because the legislature of South Carolina can put an end to the judicial career of any judge or justice at the close of his term in office, by the simple mechanics of not re-electing him thereto.

The power exercised by the South Carolina State legislature is a complete take-over of the judicial department of said state, and is not a mere occasional or incidental exercise of the elective power, and far exceeds the degree of tolerance allowed by Article 4, Section 4, of the United States Constitution. In *Springer v. The Government of the Philippine Islands,* supra, this Court said:

> "The existence in the various Constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule."

QUESTION NUMBER 9

Those who claim South Carolina State Circuit Court judgeships, and that includes the one who passed the Decree in the case at bar under date of April 2, 1963, and those who claim South Carolina State Supreme Court justiceships, and that includes the ones who passed the majority opinion and final judgment in the case at bar under date of December 11, 1963, had and have no standing whatsoever as such.

Basing their claims to office, as they must, on the legislative election or appointment aforesaid, they were not judges or justices of said courts, for their said elections or appointments were void, and under these circumstances, they could not be officers de jure.

In *Luther v. Borden*, 48 U. S. 1, 12 L. Ed. 581, this Court held that where a person's appointment as a judge failed for lack of appointment power in the appointing

agency, that person, as a judge, fell with the falling of the appointive power.

In *Hickman v. Jones*, 76 U. S. 197, 19 L. Ed. 551, this Court held that certain persons were not judges, where they based their claims to office on appointments made by a state agency which had no power to so appoint them.

The appointments in the case at bar were made by an agency just as devoid of elective or appointive power as were the agencies in the two cases last above cited.

Those who would hold judicial offices as aforesaid in the State of South Carolina, cannot hold as officers de facto, color of title, usurpers in office, or any other thing of the like. Because those are fictions invented to protect innocent third parties who had been misled into dealing with such persons as officers. In the case at bar, nobody has been misled into dealing with them. For there is no equitable ground upon which the Greenville City Council can claim, that had it known that the above parties were not judges and justices, it would not have passed the amendatory zoning ordinance of July 10, 1962. And where the reason for a rule does not exist, the rule has no application. When a case comes before the Court with the reason for the rule in it, that will be time enough to apply the rule.

Furthermore, rules of fiction are for the benefit of the public, and when such a rule would work against the public, instead of for it, the rule has no application. And that is the situation here. For one governmental department to have an advantage over another department is, as a matter of law, un-American and bad. And it is immaterial whether the department having an advantage over the judicial department is the executive, as in the pre-Revolutionary War days, or the legislative, as at the present time in South Carolina.

In the case at bar, the legislature had no capacity to receive, or to be vested with, the elective or appointive power relative to judges and justices. Therefore, its inability to elect or to appoint said judicial officers was a matter of law, with which every one was charged with

notice. In *Springer v. The Government of the Philippine Islands*, supra, this Court said:

> "The appointment of manager (in this instance corporate directors) of property or business, is essentially an executive act which the legislature is without capacity to perform directly or through any of its members."

The quality of the election or appointment of the judges and justices cannot be greater than the power to elect or appoint held by the General Assembly, because no stream can rise higher than its source. The grant of elective or appointive power to the legislature was void, being in violation of Article 4, Section 4, of the United States Constitution, and such violation appearing upon the face of that grant, there was no presumption that it was valid. Constitutional Law, 16 C. J. S. Section 99, note 54. Since the legislature was incapable of receiving said elective or appointive grant, it stands as if it had been made to the members of the General Assembly in their individual capacity. And where private parties perform an official act, it carries no presumption of validity. Constitutional Law, 16 C. J. S. Section 99, note 54.15.

Infra it will be shown that the separation of governmental powers — entwined in Article 4, Section 4, of the United States Constitution, has been recognized as the lifeblood of and the greatest principle in any free constitution, and if the operation of the greatest principle in the greatest Constitution on earth, can be forestalled by a mere presumption — if such a presumption even exists here — of the validity of Sections 2 and 13 of Article 5, of the South Carolina State Constitution, handicapped as they are by irreconcilable conflicting provisions in the said State Constitution, and carrying as they do on their face defiance of the said Article 4, Section 4, in the United States Constitution aforesaid, then what are the lesser constitutional freedom guarantees worth?

Void elective and appointive acts performed by the legislature are to be distinguished from the passage of unconstitutional statutes. The passage of statutes is the busi-

ness of the legislature, and therefore it is a legislative function, and where the violation or defeat of a constitutional provision does not appear upon its face, a statute is presumed to be valid, until adjudicated otherwise. But non-legislative functions performed by the legislature, such as the election or appointment of the judicial officers, are not clothed with the presumption of validity, and when their election or appointment carries notice on its face of its unconstitutionality, all parties who deal with such officers do so with notice and at their peril.

That resort to higher courts is expensive, is no answer to the above assertion. The protection of human rights has always been, is, and always will be expensive. The task of counting the tombstones on the battlefields of the world would be a tremendous undertaking. Yet we know of no sensible person advocating the doctrine of surrender. Good and legal government is worth all it costs.

Futhermore, the discrimination practiced by the legislature in the election or appointment of the judges and justices is also sufficient to invalidate their elections or appointments, and their decisions, judgments, decrees and all other official actions. And this phase of this question will now be argued in anticipation of sustaining the next question — Question Number 10, which undertakes to show discrimination.

Discrimination in the election or appointment of a public official invalidates the election or appointment. A grand juror who is chosen through discrimination — *Carter v. Texas*, 177 U. S. 447, 20 S. Ct. 687, 44 L. Ed. 839; and a petit juror who is so chosen — *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664, and *Martin v. Texas*, 200 U. S. 316, 26 S. Ct. 338, 50 L. Ed. 497, are no jurors.

Discrimination in the drawing of a grand jury invalidates the panel. In *Wood v. Brush*, 140 U. S. 370, 11 S. Ct. 942, 35 L. Ed. 505, the Court said:

> "the defect in the constitution of the tribunal deprived it of the character of a grand jury in a constitutional sense,"

Paraphrased to correspond to the state agency here involved — discrimination practiced in the selection of judges and justices, the quotation would read as follows:

> "the defect in the constitution of the tribunal deprived it of the character of a bench in a constitutional sense,"

The fact that in the cases cited, colored people alone were discriminated against, while in the case at bar practically all people of every race and color are discriminated against, is of no importance, because discrimination offends the Fourteenth Amendment to the Constitution of the United States. And the said amendment is no race or color amendment. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220. Here membership, past or present, in the General Assembly, is arrayed against non-membership therein.

Question Number 10

The General Assembly of the State of South Carolina has practiced the closed shop in the election or appointment of the judges of the State Circuit Courts and of the justices of the State Supreme Court for at least the last 40 years, and this practice was in force, effect and operation when all of those who now claim office as judges and justices were elected or appointed thereto by the General Assembly. However, an unconstitutional act, regardless of the number of times repeated, never loses its unconstitutional character. *Fairbank v. United States*, 181 U. S. 283, 307, 21 S. Ct. 648, 45 L. Ed. 862. If this were not true, then administrative discrimination — which consists in a number of discriminatory acts, would have become legal by the time it became apparent.

In the division of this Jurisdictional Statement, under the caption of Statement of the Case, mention was made that the facts needed to support the new questions raised in this appeal, are judicially noticed by the courts. This rule of judicial notice should have peculiar application to the case at bar, because the judge and justices of the state courts who participated in the trial and final decision and final judgment herein, were all elected or appointed to of-

fice under the said illegal and discriminatory system. All courts take judicial notice of when and how their judges were elected. Evidence, 31 C. J. S. Section 48. This should have special application where, as here, the judge and justices were, at the time they entered the judicial system, part of the election or appointment machinery, as well as being the parties elected or appointed thereby. Therefore, the general rule that courts do not take judicial notice of usurpation officeholders, has no application here. These facts are judicially noticed also on another ground — they are matters of common knowledge.

Facts thus brought before the Court are these — there are approximately 1,500 lawyers in South Carolina who are eligible for election or appointment to the judiciary of South Carolina; there are probably less than 75 lawyers in the General Assembly of South Carolina who are eligible for election or appointment to judicial office in said State, and that has been about the ratio of lawyers in and out of the legislature in said State for the last 40 years; that during said 40 years there have been approximately 100 vacancies on the State Circuit Court and State Supreme Court benches in said State, and that members of the General Assembly, past and present, were elected or appointed by the General Assembly to approximately 95 of said vacancies, and the bar at large got about 5 of them. When this case — the one at bar — was brought, and now, there are 19 members of the South Carolina State judiciary — that is, 14 judges on the Circuit Court, and 5 Justices on the Supreme Court, and of those 19, 17 were members of the said General Assembly when they were elected or appointed by the said General Assembly to a place in the said judicial system, 1 had been a recent member, and 1 was not, and probably had never been, a member of the legislature.

This establishes a systematic plan of discrimination by the General Assembly against non-General Assembly member lawyers in the elections or appointments of judges and justices to the judicial system of South Carolina. In *Springer v. The Government of the Philippine Islands*, su-

pra, a much smaller number of appointment was held sufficient to warrant the inference of discrimination. In that case this Court said:

> "It is worthy of note that this voting power has been similarly devolved by the Legislature upon at least four other corporations: . . . (here naming them) . . . and the suggestion of the Solicitor General that this indicates a systematic plan on the part of the legislature to take over, through its presiding officers, the direct control generally of nationally organized or controlled stock corporations would seem to be warranted."

Neither of the two judges — who are Circuit Court judges — and who were elected or appointed to office as aforesaid while they were not members of the General Assembly, participated at any stage in the case at bar. Therefore, so far as appellant is concerned, the discrimination practiced by the General Assembly was 100% complete.

QUESTION NUMBER 11

Appellant was entitled to have its case tried in a court lawfully constituted, and the fact that practically all other parties in South Carolina were also discriminated against, does not take away appellant's right to invoke the Due Process of Law, and the Equal Protection of the Laws, Clauses in the Fourteenth Amendment to the Constitution of the United States, against such discrimination.

This Court has held on various occasions that discrimination that affects a particular race, and therefore a part of the population, is unlawful. *Carter v. Texas*, supra; *Strauder v. West Virginia*, supra; and *Wood v. Brush*, supra. A fortiori a discrimination against practically the whole population is unlawful.

Appellant had the right to have the courts trying its case composed of a cross section of the lawyers of the State of South Carolina, which would have naturally so resulted had the courts been filled with judges and justices elected or appointed without discrimination, instead of being packed — as far as this case is concerned — with 100%

from one class of lawyers, namely: legislators, when the case involved the validity of a piece of legislation — the Greenville amendatory zoning ordinance passed July 10, 1962. The denial of this right deprived appellant of rights and property without due process of law, and denied to it the equal protection of the laws, in violation of the Due Process of Law, and the Equal Protection of the Laws, Clauses in the Fourteenth Amendment to the Constitution of the United States. Compare *Wood v. Brush*, supra.

QUESTION NUMBER 12

The Decree of the Court of Common Pleas, dated April 2, 1963, and the Majority Opinion and Final Judgment of the State Supreme Court, dated December 11. 1963, are null and void, because the judge and justices who signed and passed them were elected or appointed by the General Assembly of South Carolina, which, as a matter of law, had no such elective or appointive power, and was, as a matter of law, incapable of being so empowered.

Decrees, judgments and official acts of judges and justices elected or appointed by state agencies which lacked appointive or elective power, were held to be null and void in *Luther v. Borden*, supra, and in *Hickman v. Jones*, supra.

Where discrimination had been practiced in the selection of a grand jury, its indictment was held to be null and void in *Carter v. Texas*, supra; and where discrimination had been practiced in the selection of a petit jury, its verdict was held to be null and void in *Strauder v. West Virginia*, supra. Other cases in support of these points could be cited.

A judge or justice is as important in a court as a grand or petit jury, and the same rule against discrimination in their selection should apply to a judge or justice. Therefore, the said Decree, and the Majority Opinion and Final Judgment aforesaid, should be declared null and void.

There are these legal principles to remember about a thing that is null and void as a matter of law: it may be

attacked on sight, by anybody, at any time, anywhere. Since it is illegal from its inception — void ab initio, it does not have to be first adjudicated so. And it never outlives its infirmities, but they, being born with it, go wherever it goes. And as said in *Wood v. Brush*, supra, the trial court will set it aside, and if the trial court fails to do so, it will be set aside on appeal by this Court.

In *Luther v. Borden*, supra, this Court discussed in some detail the effects of invalidity in governmental set up, and while in that case the whole state government was questioned, nevertheless, what was said there is applicable here, even though in the case at bar only the judicial department is involved. The fact that here the area is restricted, should not keep the legal principles therein stated from cutting just as deeply in the area involved. In that case this Court said that if the state government therein under consideration were illegal, then:

> "the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases (were) null and void, . . . "

Since only the state court judges and justices are involved in the case at bar, what is said in the above case, that is applicable to them and their official actions, should apply. The fact that other departments of the state government are not involved, should not change the rules that are applicable to judges and justices and their official actions.

The controlling factor is this: the judges and justices, having no official life within themselves, could not impart any official life to their acts, decrees or judgments. No one ever cuts twigs for grafting from dead bushes, regardless of their size.

It is believed to be important to call the Court's attention to the distinction between a thing which is void, and one that is merely voidable. A thing that is void requires no action by anyone — it is void under its own power. But a thing that is merely voidable takes its place

in the world, until and unless someone takes action to have it set aside. Therefore, if the judgments of the Supreme Court of South Carolina are void, then they are the same as if they had never been rendered, and no action is required by anyone to invalidate them. But, if the judgments are merely voidable, then they take their place as judgments, unless and until they are brought before this Court and adjudged invalid, and any judgment not appealed within 90 days after its rendition cannot be questioned.

QUESTION NUMBER 13

Appellant can raise for the first time on this appeal Questions Numbers 8 through 12, both inclusive, because they are, or ultimately culminate in, federal questions relating to the United States Constitution, and they could not have been raised in the state courts below. Inability to raise federal constitutional questions in the state courts does not abridge a party's right to raise the same, but just postpones their interposition.

The questions aforesaid raise issues relative to whether those who pose as South Carolina State Court judges and justices are really so. These issues could not have been raised and determined in the state courts, because (a) the judges and justices, by accepting office under the challenged elective or appointive system, committed themselves to the validity thereof, and (b) they are without jurisdiction to try the same, for were they to hold the said system invalid, that would strip them of any judicial power, and their decision would be coram non judice.

In *Luther v. Borden*, supra, some of just such questions as are here raised, were raised for the first time on appeal to this Court, and the Court considered them. The following quotation is from that case:

> "Indeed, we do not see how the question could be tried and judicially decided in a state court. Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The

> acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is annulled and overthrown, the power of its courts and other officers is null with it. And if a state court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial powers."

While in the case just cited, the validity of the whole state government was in question, however, in the case at bar, only the validity of the elective or appointive power of the legislature is involved. But in each instance, the jurisdiction of the state court is lacking. For here it is solely through the exercise of that questioned elective or appointive legislative power that the state court judges and justices hold office. It is the fall of that part of a state government upon which an officeholder stands, that effects his downfall. That part of the government upon which an officeholder officially stands, is the whole government, as far as he is concerned. And every reason set forth in *Luther v. Borden*, supra, why the state court judges in that case could not try the validity of their judgeships, apply with full force in the case at bar. They all relate to the jurisdiction of the state court.

The rule in *Luther v. Borden*, supra, that a court which has no choice or freedom of action to decide a question, but must decide it in only one way, has no jurisdiction to decide at all, has found frequent application in our courts. For instance, this Court has no jurisdiction of a state court case wherein the question raised was decided on both state and federal grounds, because this Court has no reviewing power over the state ground, and would have to affirm the state court decision, even though the

state court wrongly decided the federal question. *New Orleans Water-Works Company v. Louisiana Sugar Refining Company*, supra., and see the cases therein cited on this point.

While the authorities cited are believed to be fully sufficient to sustain the raising now of the questions aforesaid, nevertheless, appellant will call this Court's attention to another obstacle in the way to raising said questions in the state courts. It goes to the state courts' jurisdiction to hear these new questions, too.

For all practical purposes, the South Carolina State Legislature has abolished the right of a private party to raise these questions in the state courts, probably in anticipation of an attack upon its elective or appointive power. Section 10-2251, Code of Laws of South Carolina, 1962, abolished Scire Facias and Quo Warranto; Section 10-2256 of said code practically prohibited the raising of such questions in the state courts by private parties, and limited the raising of such questions to actions brought by the Attorney-General of said state; and under Section 10-2260 of said code, when such an action is brought by the said Attorney-General at the request of a private party, such party must post a cost and expense bond, the amount of which must be fixed by a Circuit Court judge, and said party must pay to the said Attorney-General, for his services in the case, such fee as he and said party may mutually agree upon. Said statutes are printed in Appendix B hereto, pages 76-77.

Appellant waived no rights to raise these new questions, which go to the state courts' jurisdiction, by bringing this action in the Court of Common Pleas, or by appealing the judgment of that court to the State Supreme Court. Under the Republican Form of Government that the State of South Carolina owes to appellant, is a judicial system — and that means a valid and lawful system. The right of a party to a lawful state government is inalienable, and cannot be waived.

These courts were what the state furnished appellant, and it had no choice but to either use them, or forego the

enforcement of its legal rights. This is an equity case, and there was no other court with chancery powers available to appellant, except the Greenville County Court, and its judge was not legally elected or appointed. He is elected or appointed in this manner: A majority of the Greenville County Bar Association recommends an eligible lawyer for that judgeship; the recommendation goes to the Greenville County Delegation of the South Carolina State General Assembly, and if that delegation approves the recommendation, the Governor perfunctorily issues the appointment. The statute is printed in Appendix B hereto, page 77.

The waiver of a right presupposes a choice between the relinquishment and enforcement thereof. *Glendale v. Coquat*, 46 Arizona 478, 52 P. 2d 1178. There was no opportunity to raise these new questions in the State Courts of South Carolina, for they lacked jurisdiction to hear them. Therefore, there could be no intentional relinquishment inferred from the failure to raise them in the State Courts. Intentional relinquishment is an essential element in waiver. *Johnson v. Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461. Courts indulge every reasonable presumption against waiver. *Aetna Insurance Co. v. Kennedy*, 301 U. S. 389, 393, 57 S. Ct. 809, 812, 81 L. Ed. 1177. And the courts will not presume acquiescence in the loss of fundamental rights. *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 307, 57 S. Ct. 724, 731, 81 L. Ed. 1093.

But a more insurmountable obstacle stands in the way of there being any waiver in this case. These new questions involve the jurisdiction of the State Courts to hear and determine them, that is, the issues they raise. Such questions and issues relating to jurisdiction cannot be waived, even if the parties tried to. Jurisdictional questions can be raised in a lower court, apparently abandoned, and renewed on appeal in this Court. In *City of Gainesville v. Brown-Crummer Investment Co. et al.*, 277 U. S. 54, 48 S. Ct. 454, 72 L. Ed. 781, this Court said:

> "The stipulation, therefore, would seem to constitute an acquiescence in the removal, and indicate that the

> jurisdiction had been conceded by all parties, and that the question had been abandoned until it is now renewed in the briefs in this court. Of course a question of jurisdiction cannot be waived. Jurisdiction should affirmatively appear, and the question may be raised at any time. Grace v. American Central Ins. Co., 109 U. S. 278, 283, 3 S. Ct. 207, 27 L. Ed. 932; Mansfield C. & L. M. Railway Co. v. Swan, 111 U. S. 379, 382, 4 S. Ct. 510, 28 L. Ed. 462; Mattingly v. Northwestern Virginia Railroad Co., 158 U. S. 53, 56, 57, 15 S. Ct. 725, 39 L. Ed. 894."

Jurisdiction of the subject-matter cannot be conferred upon a court by way of estoppel. Accordingly, a party may invoke the aid of a court, prevail upon it to act over the jurisdictional objection of the other party, and after the court has acted to his dissatisfaction, appeal and raise the jurisdictional issue himself. *Mansfield C. & L. M. Railway Co. v. Swan*, 111 U. S. 379, 4 S. Ct. 510, 28 L. Ed. 462.

There is no reason why this Court should be reluctant to exercise its jurisdiction in the case at bar, because:

(1) The importance of the case calls for action; and,

(2) There is no reason to leave the matter to Congress; for action by Congress would penalize the innocent people of the State unnecessarily, since Congress has already given clearance for Court action, if such clearance were necessary.

The importance of the case is clearly apparent. If the election or appointment of the state court judges and justices is invalid, then their decrees and judgments are null and void, and those who execute them are trespassers. *Luther v. Borden*, supra, and *Hickman v. Jones*, supra. Then, what is the status of:

(a) The electrocution of a person whose trial, conviction and sentence are null and void? And,

(b) The forced collection of a judgment, when the trial, verdict and judgment are null and void?

The answers are obvious.

Relief lies solely in the judgment of this Court.

The state court judges and justices are helpless, for while they sit as judges and justices they are conclusively committed to the validity of the system under which they hold office, and if they resign, then they would have no official authority.

Practically speaking, the people of South Carolina are helpless too. There can be no amendment to, or the writing of a new, constitution for said State unless the same is first approved by a two-thirds vote of both houses of the General Assembly. Article 16, Sections 1 and 3, of the said State Constitution, cover these matters, and said sections are printed in Appendix B hereto. State Statutes practically prohibit test suits in these matters, and the state courts would have no jurisdiction over such suits, were they permitted.

Congress has necessarily given clearance to this Court to act upon Sections 2 and 13 of Article 5 of the South Carolina State Constitution, and upon Section 15-101, Code of Laws of South Carolina, 1962, if notwithstanding the importance of the questions involved, this Court nevertheless thinks that congressional clearance is necessary.

Congress must be assumed to have seated the South Carolina Congressional delegation on the strength of Article 1, Section 14, of the South Carolina State Constitution, for it reads:

> "In the government of this State the legislative, executive and judicial powers of the Government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."

That section meets every requirement of Article 4, Section 4, of the United States Constitution, as construed and interpreted by this Court in *Springer v. The Government of the Philippine Islands*, supra.

Then the said State Constitution sets up a legislative branch by Article III, Section 1, as follows:

> "The legislative power of this State shall be vested in two distinct branches, the one to be styled the 'Senate'

and the other the 'House of Representatives,' and both together the 'General Assembly of the State of South Carolina.'"

There is no conflict here with Article 4, Section 4, of the Constitution of the United States.

Then the said State Constitution sets up an executive branch by Article IV, Section 1, as follows:

"The supreme executive authority of this State shall be vested in a Chief Magistrate, who shall be styled 'The Governor of the State of South Carolina.'"

Again, there is no conflict here with Article 4, Section 4, of the Constitution of the United States.

Now, the said State Constitution sets up a judicial branch by Article V, Section 1, as follows:

"The Judicial power of this State shall be vested in a Supreme Court, in two Circuit Courts, to wit: A Court of Common Pleas having civil jurisdiction and a Court of General Sessions with criminal jurisdiction only. The General Assembly may also establish County Courts, Municipal Courts and such Courts in any or all of the Counties of this State inferior to Circuit Courts as may be deemed necessary, . . ." For full text see Appendix B hereto, page 73.

Still, there is no conflict with Article 4, Section 4, of the Constitution of the United States, for this section of the State Constitution conferred no non-legislative powers on the General Assembly.

Figuratively speaking, the foregoing was the South Carolina State Constitution that the South Carolina Congressional delegation read to Congress, and it as so read, was approved by Congress, for the South Carolina delegation was seated. This was a matter within the province of Congress. *Luther v. Borden*, supra; *Highland Farm Dairy v. Agnew*, 300 U. S. 608, 57 S. Ct. 549, 81 L. Ed. 835.

Congress, having approved the foregoing, must necessarily have disapproved and rejected any other provisions in the said South Carolina State Constitution that are in irreconcilable conflict with the sections read. That rejec-

tion is binding upon all other departments of the United States Government. *Pacific States Tel. & Tel. Co. v. State of Oregon*, 223 U. S. 118, 32 S. Ct. 224, 56 L. Ed. 377. Of course, Congress did not pass upon any question of administrative discrimination, for that did not appear in the State Constitution, and was therefore not before it.

Now, this is how and where the trouble comes in:

The South Carolina State Constitution is of a dual character; it is two faced, or a Doctor Jekyll and Mr. Hyde, and it is this other Constitution — not the one read to Congress — that is read to the people back home in South Carolina, and that the State is run by. Sections 2 and 13, of Article 5, of the South Carolina State Constitution, destroy Article 1, Section 14, Article III, Section 1, Article IV, Section 1, and Article V, Section 1, of the said South Carolina State Constitution, and is clearly in defiance of Article 4, Section 4, of the Constitution of the United States, as construed and interpreted by this Court, in the cases herein cited. Those Congressionally outlawed sections read as follows:

Article 5, Section 2, South Carolina State Constitution:

> "The Supreme Court shall consist of a Chief Justice and four Associate Justices, any three of whom shall constitute a quorum for the transaction of business. The Chief Justice shall preside, and in his absence the senior Associate Justice. They shall be elected by a joint viva voce vote of the General Assembly for the term of ten years, and shall continue in office until their successors shall be elected and qualified, and shall be so classified, that one of them shall go out of office every two years."

Section 15-101, Code of Laws of South Carolina (1952), 1962, is like unto the constitutional section last above quoted, and it is printed in Appendix B, page 77.

Article 5, Section 13, South Carolina State Constitution:

> "The State shall be divided into as many Judicial Circuits as the General Assembly may prescribe, and for each Circuit a Judge shall be elected by joint viva voce

vote of the General Assembly, who shall hold his office for a term of four years; . . . " Text quoted in full in discussion of Question Number 8, page 18.

The fact that the South Carolina Congressional delegation, and Congress, left out Sections 2 and 13, of Article 5, of the South Carolina Constitution, did not leave that Constitution incomplete. Because the providing of a method for the election of the judges, just as the legislative fixing of their salaries — Section 9, Article 5, of said State Constitution, could be supplied by act of the State Legislature. Section 15-101, Code of Laws of South Carolina, 1962, is a living example of the power of the State Legislature to act in such matters. That section of the Code is not being attacked herein on the ground that the State Legislature did not have power to deal with the subject, but solely on the ground that the elective power is a non-legislative function, and therefore the State Legislature could not vest itself therewith. The fact that a state legislature cannot pass unconstitutional statutes, is no argument against its power to legislate properly.

Congress, by approving the South Carolina State Constitution dominated by Section 14, of Article 1, thereof, implemented as it was by Article III, Section 1, which put the legislative power in a legislature, and Article IV, Section 1, which put the executive power in an executive department, and Article V, Section 1, which put the judicial power in a judicial department, per force of necessity, disapproved and repudiated Sections 2 and 13 of Article 5 of the said State Constitution. Those 4 sections first mentioned are in irreconcilable conflict with the 2 sections last mentioned, because:

The 4 sections first mentioned bespeak of separation, equality and independence, among the three governmental branches, while the 2 sections last above mentioned destroy the separation of power by usurping upon the legislature, in a big way, non-legislative functions, and making the judicial department dependent upon the legislative department, and there can be no equality in a case like that.

There is another legal principle under which this Court can take judicial action, in addition to its own prerogative power, and the Congressional clearance aforesaid, and that is under the rule of documentary construction. When in any document — a constitution in the case at bar, there are conflicting provisions, and they all cannot stand together, and some comply with superior law — Article 4, Section 4, United States Constitution, in the case at bar, while others defy that law, the legal provisions — the 4 constitutional sections aforesaid — should be sustained, and the invalid provisions — the 2 constitutional sections aforesaid, should be rejected. Furthermore, the said 4 constitutional sections are superior both in number and vitality to the other 2 said sections, irrespective of Article 4, Section 4, of the United States Constitution.

These conflicting provisions in the South Carolina State Constitution involve the separation of power, and those sections of the State Constitution that provide for its separation are stronger than those which commingle it.

In *Myers v. United States*, supra, this Court quoted with approval what Mr. Madison said on this point in the first Congress, to wit:

> "If there is a principle in our Constitution, indeed in any free Constitution more sacred than another, it is that which separates the legislative, executive and judicial powers."

Mr. Madison was also right in the eyes of all freedom loving people, because the head of any government in which the powers are not divided is a dictator.

The system of electing the judges by the legislature is not democratic and it is not American. Only three other states in the Union elect their judges by the legislature — Rhode Island, Vermont and Virginia. The Book of the States, 1954-1955 Edition, page 436. If the legislature can be empowered to elect the judges, could it not also be empowered to elect the Governor? And if the lawyers of Greenville County can name the Greenville County Court judge, then the doctors and dentists should be authorized to name some public officer. The teachers and other groups

should not be forgotten. If South Carolina is to have a farmed out dictatorship, it should be at least on an equitable basis, and since it is not, there is unlawful discrimination.

This Court has jurisdiction, even if reluctantly, of the subject matter of the questions raised for the first time in this Notice of Appeal — *Rescue Army v. Municipal Court*, 331 U. S. 570, 67 S. Ct. 1420, 91 L. Ed. 1679 — and appellant believes that the importance of these questions call for their determination by this Court.

In event this Court questions its jurisdiction to hear and determine these new questions on this appeal, then under Title 28, United States Code, Section 2103, the Court can treat this appeal as an application for a Writ of certiorari, and under Title 28, United States Code, Section 1257 (3), a prior state court decision on the question involved is not made a condition precedent to that Writ.

The rule that requires a question to be first submitted to the state court for decision presupposes that the state court has jurisdiction to hear and determine it, which is not the case at bar. Since as a matter of law, the state courts could rule only one way on Questions Number 8 through 12, both inclusive, and we know that way — that Sections 2 and 13 of Article 5 of the South Carolina State Constitution, and Section 15-101, Code of Laws of South Carolina, 1962, and the system of electing judges and justices which they set up, are valid, we have, for all practical purpcses, a decision by the South Carolina State courts on those questions, determined as aforesaid.

Furthermore, where a case, as here, is properly before the Court on an appeal, based on the constitutional repugnancy of a state statute and municipal ordinance to the Constitution of the United States, this Court has the jurisdiction to, and could with propriety, raise these new questions on its own motion, since they have been brought to the Court's attention, and the public welfare is so deeply involved. *Robinson v. Robinson*, 23 Wash. 2d 93, 159 P. 2d 903; *Johnson v. State ex rel. Maxcy*, 99 Fla. 1311, 128 So. 853, 857; *Miller v. Michigan State Apple Commission*,

296 Mich. 248, 296 N. W. 245. There are no constitutional or statutory provisions forbidding this Court to act sue sponte, for it so acted in *U. S. v. Ohio Power Co.*, 353 U. S. 98, 77 S. Ct. 652, 1 L. Ed. 683. And any rule of court to the contrary relaxes under the wording of *Rule 10, para. 4*, of this Court. See also *U. S. v. Brietling*, 61 U. S. 252, 15 L. Ed. 900. The Rules of this Court relax when they would prevent an adjudication where (1) the ends of justice require a decision — *U. S. v. Ohio Power Co.*, supra, or (2) the public interest is involved — *State of Florida ex rel. Hawkins v. Board of Control*, 350 U. S. 413, 76 S. Ct. 464, 100 L. Ed. 486. In the case at bar, the ends of justice and the public interest both require an adjudication of all of the questions raised in this appeal, and no rule of court should intervene to prevent a full and complete determination. When all of the military might that the British Empire could muster at Bunker Hill, Concord and other places, could not prevent appellant, and the more than two million citizens in South Carolina, from succeeding to the right to a Republican Form of Government, only the most formidable obstacles should now prevent their realization of that right.

If consideration by this Court of the new questions raised on this appeal can now be forestalled, then the same means can be used to forestall consideration of them in any future case. And since these questions cannot be raised and decided in the State Courts, an illegal judicial system would be fostered upon the people of South Carolina perpetually. And the people of any state are in sad circumstances when the judicial system of that state, by which the right of the people to life, liberty and property, is adjudicated, cannot itself stand a correct, fair and impartial adjudication. And a correct, fair and impartial adjudication is all that this appellant asks concerning the judicial system that it brings before this Court by the new questions raised on this appeal. Appellant believes that it has been far more explicit than the Rules required in its Notice of Appeal, thereby more fully informing appellees

of the issues that would be involved, so as to take no undue advantage of them.

CONCLUSION.

It is therefore urged that the questions presented to this Court for consideration and determination are federal, constitutional, substantial and of great public concern; that this Court should hear and determine all questions raised on this appeal, new as well as old; that it should adjudicate the state judicial system employed in South Carolina invalid in respect to the matters embraced within the questions raised herein, and the judicial acts, decrees, opinions and judgments passed in the case at bar to be null and void; that the Amendatory Zoning Ordinance of July 10, 1962, be declared void; and for such other relief as may be proper, including the reversal of the decision and final judgment appealed from.

Respectfully submitted,

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Attorney for Appellant.

APPENDIX A.

Tenth Paragraph of Amended Complaint.

(Transcript Fl. 28-30)

That unless the Court enjoins the defendants, they will treat said re-zoning Ordinance as legal and valid, the said City Manager will accord it full force and effect, and the said Building Commissioner will do likewise, and will issue permits to build and operate retail shopping center stores and businesses on the said Wilson property, under authority of said invalid Ordinance, or recognize as valid unlawful permits already issued thereunder, pursuant to which retail shopping center buildings will be erected on said property, and retail shopping center stores or businesses will be operated therein, so burdening plaintiff's said property as to amount to a taking thereof for private use, or for public use without any compensation therefor, to plaintiff's great and irreparable injury and damage, against which it has no adequate remedy at law, and would be a deprivation of plaintiff's property and property rights without due process of law, in violation of the due process clause of the Constitution of the State of South Carolina, and of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and failure herein to protect plaintiff's property and its property rights would be denying to it the equal protection of the laws, in violation of the equal protection of the laws clause of the State Constitution aforesaid, and of the Equal Protection of the Laws Clause of the said Fourteenth Amendment to the Constitution of the United States.

Master's Report

Filed January 3, 1963, in

Court of Common Pleas for Greenville County.

This matter was referred to me under a general Order of Reference to take the testimony and report my findings of fact and conclusions of law.

I held a reference on October 22 and 23, 1962 and on November 15, 1962 at which time considerable testimony was taken and a large number of exhibits were offered. The testimony and exhibits are herewith transmitted to the Court.

Plaintiff originally instituted this action by its Summons and Complaint dated July 30, 1962 and subsequently an amended Complaint was filed. The original and the Amended Complaint differ only slightly.

Defendants filed their Answer to both Complaints on or about August 3, 1962.

The action involves the right of the City of Greenville to amend its zoning ordinances within its ordinances and under the statutory law of South Carolina.

The State Legislature has given municipalities the right to enact zoning ordinances in *Chapter 47, Article I of the 1952 S. C. Code* as amended.

Pursuant to this authority, the City of Greenville adopted a zoning ordinance as contained in *Chapter 25* of the 1953 Code of the City, as amended.

The City first adopted a zoning ordinance, or a comprehensive plan of zoning, in 1944. This plan has been amended from time to time as the City has expanded and as the requirements of the development of a rapidly growing city necessitates.

Condensed, the question involved is whether or not the City of Greenville, hereinafter referred to as "the City," has the legislative right under the State law to amend its zoning ordinances to re-zone what has been re-

ferred to as "the Wilson property" from residential to business property.

Plaintiff contends that the re-zoning of this property from residential to business will adversely interfere with the operation of its University; will depreciate the value of its property; will adversely affect the morals and general welfare of its students; will cause traffic congestion and thereby endanger the people using the public ways; will affect the health of its students; and otherwise adversely injure it as alleged in its Complaint and its amended Complaint.

Defendants in effect have filed a general denial and declared that what the City did was in accord with State law.

It is admitted that the procedure of the City in the enactment of the zoning change conformed in every respect with State law and the ordinances of the City. The dispute arises as to the right, or authority, of the City to effect the change.

What may properly be considered as the "landmark" case on zoning in this country is *Euclid vs. Ambler Realty Company*, 272 U. S. 365, 47 S. Ct. 114, 71 Law. Ed. 303, 54 A.L.R. 1016.

The general rules of law applicable to zoning and the use of land and the rights of a property owner will hereinafter be referred to.

FINDINGS OF FACT

1. I find that a municipality in this State has the right to enact zoning laws under *Chapter 47 of the 1952 Code, Article I*, as amended.

2. I find that the City, pursuant to this authority, has enacted zoning ordinances as contained in the 1953 City Code, Chapter 25, as amended.

3. I find that the City, with respect to the amended ordinance as it pertains to the "Wilson property," has complied with all State law and the ordinances of the City.

4. I find that the City, in amending its zoning ordinances as it pertains to the matter in controversy general-

ly referred to as the "Wilson property" and adopted by an Ordinance of the City July 10, 1962, acted reasonably in every respect and as authorized by the State Legislature and as prescribed by its ordinances and that the ordinance questioned in this action should be declared valid.

5. I find that the objecting parties, numbering some one hundred seventy-four (174), did not file their objections within the time required and such objection therefore cannot be considered.

6. I find that much testimony offered by both parties was irrelevant and incompetent. Both parties agreed that I must take all testimony, but that I had the right to consider only such testimony as I thought proper. I have done this, and, consequently, a large portion of the testimony and exhibits have been sifted as the "chaff from the wheat."

7. I find that the Plaintiff in this action consented to an Order of Dismissal in the case of Plaintiff vs. W. H. Wilson, et al., Complaint dated July 5, 1962, Judgement Roll I-5124, offered in evidence by Defendants in this action, involving certain restrictive covenants.

8. I find that all of the acts complained of by the Plaintiff are without merit and that the acts of Defendants are reasonable and legal in every respect and the Complaint of the Plaintiff should, therefore, be dismissed.

9. Both sides have filed exhaustive briefs which have been most helpful and in addition I have heard oral arguments. In my conclusions of law I will not attempt to determine the many situations contained in the briefs, but will only refer to those which I think may be necessary.

I CONCLUDE AS A MATTER OF LAW

1. The applicable law as contained in Chapter 47 of the 1952 South Carolina Code, Article I, and the ordinance of the City of Greenville as found in Chapter 25 of the 1953 Greenville City Code, as amended by State law and the ordinance of the City, control this case.

2. As to the petition of some one hundred seventy-four (174) landowners within proximity to the area in

question, I conclude that their petition in opposition to the amended ordinance in question is not in conformity with the law and the decisions of our Supreme Court, and same must, therefore, be ignored. *Central Realty Corporation vs. Allison*, 218 S.C. 435, 447, 63 S.E. 2d 153.

3. I conclude that the right of a municipality to enact zoning ordinances pursuant to the legislative enactments hereinbefore quoted, is recognized by the United States Supreme Court in the case of *Euclid vs. Ambler Realty Company*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A.L.R. 1016.

4. I conclude that the action of the Greenville City Council in amending the zoning ordinance now before this Court complies with and follows the enunciation of *Talbot vs. Myrtle Beach*, 222 S.C. 165, 72 S.E. 2d 66.

5. I conclude that "the authority of a municipality to enact a zoning ordinance restricting the use of privately owned property is not founded in eminent domain but in the police power. *Owen vs. Smith*, 216 S.C. 382, 58 S.E. 2d 332, 29 C.J.S. Eminent Domain Par. 6; *Arnold vs. City of Spartanburg*, 201 S.C. 523, 23 S.E. 2d 735." This disposes of the contention of Plaintiff as contained in its Complaint with respect to any inhibition that may be interposed by the State or Federal Constitution.

6. The Talbot case, supra, also recognizes, and I therefore conclude, that no constitutional rights of the Plaintiff have been violated.

7. I conclude under the Talbot case, supra, that the wisdom of the legislation respecting the zoning "is a matter exclusively for legislative determination" and not for the Court.

8. I conclude that the change of the zoning in this case is not unreasonable or arbitrary, but, on the other hand, there is an apparent legal reason for the amended ordinance. I cite the Talbot case, supra, and *58 Am. Jur. 954, Section 23.*

9. I conclude that the amended ordinance in this case is within the discretion of the City Council and that the Council has investigated and found just cause for the

amendment and that the City Council is better qualified to act and pass upon the amendment than the Court, and that this Court should not substitute its judgment for that of the City Council. The Talbot case, supra, and the authority cited therein.

10. I conclude that in all cases there must be a line of demarkation involving zoning matters and that the wisdom of this line should be left to the legislative body and not the Court.

11. I conclude that the wisdom of the legislative body should not be questioned unless there is some reasonable doubt as to the constitutionality of the legislation, or unless it is shown by the clear proponderance of the evidence that such legislation is unreasonable and arbitrary. On this point I conclude that the action of the Greenville City Council was reasonable and not arbitrary.

12. I conclude that the action of the Greenville City Council must be viewed from a liberal perspective and not from a narrow perspective that might tend to question the liberality granted to a city council under the police powers as granted by the constitutional and statutory laws of this State.

13. I conclude that under the laws of this State there is a strong presumption in favor of the validity of municipal zoning, or an amendment to the master plan of zoning, and there has been no showing to me that the re-zoning in this instance was unreasonable or arbitrary. The Talbot case, supra.

14. I conclude that before an ordinance by a municipality can be declared invalid because it is unreasonable or that it might destroy the constitutional rights of anyone, a Court must view such ordinance carefully and cautiously, and it is not the function of the Court to pass upon the wisdom or expediency of a municipal ordinance or regulation. *DeTreville vs. Groover, Mayor,* 219 S.C. 313, 329, 65 S.E. 2d 232.

15. I conclude that the burden is upon the Plaintiff when it attacks the legislative action of the Greenville City Council to show that such action is unreasonable; on

the other hand, if there is existing any state of facts that would sustain such action, there is a presumption of the existence of such state of facts which will favor the legislative enactment. *Turner vs. Maryland*, 107 U.S. 38, 2 S. Ct. 44, 27 L. Ed. 370.

16. I conclude that mere allegations contained in a complaint are not sufficient without proof to sustain those allegations and the Plaintiff has not, in this action, proven such allegations within the degree required under our law.

17. I conclude that the acts of the Greenville City Council are entitled to the presumption that the Council have properly and with wisdom performed their duties. *Whitmire et al. vs. Cass et al.*, 213 S.C. 230, 49 S.E. 2d 1.

18. I conclude that the question of the change of the zoning ordinance now before this Court presented a question that was fairly debatable as to its reasonableness, wisdom, and propriety, and that the debatable question has been resolved by the City Council against the Plaintiff and same, therefore, is not reviewable by this Court. *Standard Oil Company et al. vs. City of Marysville et al.*, 73 L. Ed. 856, 279 U.S. 582. *Momeier vs. McAlister*, 90 S.E. 2d 177, 231 S.C. 526, and the Euclid case, supra.

19. I conclude that this Court has no power to zone property. *Strong vs. Winn-Dixie Stores, Inc.*, 125 S.E. 2d 628, 240 S.C. 244.

20. I conclude that the re-zoning of the property in question is not spot-zoning but on the other hand, it accords with the property which has been re-zoned immediately to the west thereof and that same is a reasonable and proper exercise of the powers granted to the Greenville City Council under the statutory law of this State and the ordinances of the City.

21. I conclude that the re-zoning of the land in question is for the public good, the morals, and general welfare of the City of Greenville and its citizens, and that the Court has no right to substitute its judgment for the legislative body of the City of Greenville under *Wilcox vs. City of Pittsburgh* (3 C.C.A.), 121 Fed. 2d 835. *Phipps vs. City of Chicago*, 339 Ill. 313, 171 N.E. 289.

22. I conclude that the character of the land involved in the amended zoning ordinance now before this Court has essentially changed and that the area from the Pet Dairy to South Carolina Highway 291 should primarily be business property. Only recently two (2) pieces of property within this area have been re-zoned, one, the branch of the First Federal Savings and Loan Association, and, two, another for a filling station, both on the northern side of Wade Hampton Boulevard, and the shopping center designated as Wade Hampton Shopping Center immediately west of the property in question and on the southern side of Wade Hampton Boulevard. (The area in question was offered in evidence. I am familiar with the same and have reviewed the same in the light of this report.)

23. I conclude that to deny the re-zoning of the "Wilson Property" would be unreasonable, arbitrary, and not in conformity with the general principles of zoning and the rights of a property owner.

RECOMMENDATIONS

I recommend that the complaint of the Plaintiff be dismissed and that the action of the Greenville City Council be upheld in every respect concerning the re-zoning of the property in question. The Plaintiff does not question the right of the Greenville City Council to amend its zoning ordinance, nor does it attack the amending ordinance under review by this court as not complying with the strict letter of the law, both as it relates to State legislation and the City Ordinances. The attack of the Plaintiff is based upon the fact that the amending ordinance is unreasonable, arbitrary, spot-zoning, and not in conformity with the general health, welfare, and morals of the City of Greenville and its inhabitants. With this I cannot agree. On the contrary, after listening to some three days' of testimony, and after examining numerous exhibits and after viewing the premises in question, my only recommendation is that the City acted wisely, fairly, and that it duly and properly considered the statutory law of this State and the ordinances of the City of Greenville with

respect to the rights of its citizens as they pertain to the general health, welfare, morals, and other surrounding conditions that are applicable. This Court has no right to substitute its judgment for the decision of that of the legislative body of the City of Greenville. Should such right exist, which does not, nevertheless I would confirm the act of the Greenville City Council.

Admittedly, the action of the Greenville City Council conformed in every respect to the statutory law of this State and the ordinances of the City. While the action of the Greenville City Council may be debatable, the matter was thoroughly discussed by the proponents and opponents as respects the amended ordinance, and the result is inescapable that the Council acted within its prerogatives in every respect and that action must be confirmed. I find nothing in the record to indicate that Council, or any member thereof, was influenced or motivated by any fact other than to promote the best interest of the public as set forth by the laws of this State and the ordinances of this City and their responsibilities thereunder.

We all must recognize that any city growing as rapidly as the City of Greenville must have changes. Such changes may result to the detriment of certain individuals. This Court cannot close its eyes to the rights of any individual, but on the other hand, it must keep its eyes open to the rights of the majority. Such is the foundation of our society and for our community to progress, such rights must be recognized and upheld.

Respectfully submitted,

E. INMAN,

Master of Greenville County

1-3-1963

Exception 12 to the Master's Report.

(Transcript folios 786, 787)

The Master erred in failing to find and conclude that re-zoning the Wilson property into a shopping center, and the use of said property as a shopping center location,

would greatly damage the property of the plaintiff and other property owners in the neighborhood of said Wilson property, against which they have no adequate remedy at law, and amount to the taking of this said properties and property rights, in violation of the Due Process Clauses of:

(a) The Constitution of the State of South Carolina; and,

(b) The Fourteenth Amendment to the Constitution of the United States.

Exception 18 to the Master's Report.

(Transcript folio 793)

The Master erred in concluding as a matter of law that since the power of a municipality to enact zoning ordinances is founded upon the police power, the inhibitions of the State and Federal Constitutions have no application, because actions based upon the police power are subject to the inhibitions, restrictions and limitations contained in the State and Federal Constitutions, and in the amendments thereto.

Exception 19 to the Master's Report.

(Transcript folio 794)

The Master erred in concluding as a matter of law that the wisdom of a zoning ordinance is exclusively for legislative determination, and not for the Court, because:

(b) The ordinance here questioned violates the Due Process Clauses of the State Constitution and of the Fourteenth Amendment to the Constitution of the United States;

Exception 21 to the Master's Report.

(Transcript folios 797, 798)

The Master erred in concluding as a matter of law that the passage of the ordinance in question was within the discretion of the Greenville City Council, because:

(b) The City Council had no discretion to pass said ordinance, since it took property without due process of law, in violation of the Due Process Clauses of the State Constitution, and of the Fourteenth Amendment to the Constitution of the United States.

Decree and Judgment of

The Court of Common Pleas for Greenville County.

Filed April 2, 1963.

This matter comes before me on exceptions, some thirty-one (31) in number, to the Report of Honorable E. Inman, Master for Greenville County, dated January 3, 1963. The primary question involved is the validity or the right of the Greenville City Council to rezone certain property in the City from residential to business. The property is referred to as the Wilson property and is located on Wade Hampton Boulevard (U. S. Highway 29). This is also referred to as the super-highway as it is a four-lane divided road which was built originally from Greenville to Spartanburg.

In company with Mr. Bowen and Mr. Arnold, and at their request, I viewed the premises and all of the surrounding area for a considerable distance.

Just east of the Wilson property and also on the Wade Hampton Boulevard is Bob Jones University. Just west of the Wilson property also on Wade Hampton Boulevard is a recently constructed shopping center referred to as Wade Hampton Shopping Center. The Wilson property and this shopping center is separated by Karen Drive. The Wilson property consists of some sixteen (16) acres and by action of the Greenville City Council, it was rezoned so as to permit the erection of a shopping center thereon.

I have heard oral arguments and have read and studied the entire record, including written briefs filed by the parties before the Master. I have given due consideration to all of the exceptions. They are rather numerous and, in some instances, repetitious and in other instances im-

material or of no value. However, I have considered each exception in the light of the record, which is very voluminous.

There is no question but what a municipality has the right to zone property, adopt a comprehensive zoning plan, and amend same from time to time. This authority is given by state law and is contained in Title 47 of the Code, Sections 47-1001, et seq. The Greenville City ordinances adopted pursuant to state authority is found in the 1953 Greenville City Code, Chapter 25, as amended.

There is really no contention by the Plaintiff that the ordinance of the City of Greenville or the State law was not followed and duly complied with by the City of Greenville in amending the zoning ordinance to permit the erection of a shopping center on the Wilson property. The Plaintiff does raise a question with respect to the written objections by some 174 residents and landowners within this area. Admittedly these objections were not filed five (5) days before the first public hearing, as required by the Greenville City ordinance, and it was proper to disregard same under the holding of the case of *Central Realty Corporation vs. Allison*, 218 S.C. 435, 63 S.E. 2d 153. Nevertheless, the record shows that on each reading of the ordinance in question, the vote was six in favor of the amendment and one against. This was more than three-fourt of the members of the Greenville City Council, including the Mayor and six Aldermen. Had the protests been filed within the time, they would have been of no avail as the voting was six in favor of the amendment and one against. setting forth his findings of fact, conclusions of law, and

The Master has filed a very comprehensive report recommendations. I see no reason to recite the authorities contained in his report.

One of Plaintiff's exceptions is that the Master did not point out the testimony and exhibits that he found to be irrelevant and incompetent and therefore what he excluded from his consideration is not clear. Both parties placed in the record a general objection to all testimony and exhibits by the opposing party. It would accomplish

no useful purpose to go through the record and point out that which is irrelevant or incompetent and that which is competent. There was much irrelevant and incompetent evidence offered and one can tell from reading and studying the Master's Report that he finally sifted the "chaff from the wheat." I have done this in my consideration of the record.

One of the first cases in our State dealing with the zoning question is *Talbot vs. Myrtle Beach*, 222 S.C. 165, 72 S.E. 2d 66. The opinion quotes at length from *Volume 58, American Jurisprudence* on zoning and also from *Yokley Zoning Law and Practice, 1948*. The underlying general legal principles applicable to zoning ordinances and the powers of a municipality thereunder are set forth. I will summarize some of the general legal principles enunciated in that case.

The wisdom of legislation is a matter exclusively for legislative determination and this has been applied to zoning law and courts have been declared to have nothing to do with the question of the wisdom, expediency, propriety or good policy thereof.

The legislative body is presumed to have investigated the conditions and found that the legislation it enacted was appropriate. Municipal governing bodies are better qualified than are the courts on zoning matters and a court will not substitute its judgment for that of a legislative body. There must be a dividing line somewhere with respect to restricted or non-restricted areas because there is no "no man's land." The court should declare zoning ordinances unconstitutional only where no substantial reason exists to support the determination of the city council and if its reasonableness is reasonably debatable, the ordinance must be upheld. The courts have adopted a liberal attitude in permitting municipalities to zone or re-zone property or to amend a zoning ordinance. The fact that property value may be depreciated does not render an ordinance void since the general welfare is superior to that of an individual.

Yokley cites numerous decisions to the effect that there is a strong presumption in favor of the validity of

zoning ordinances. There is a presumption of validity with which any ordinance is ordinarily clothed. There is a presumption that zoning boards will act fairly and with proper motives upon an application for a change in the use of premises.

The recent case of *Strong vs. Winn-Dixie Stores, Inc.*, 240 S. C. 244, 125 S. E. 2d 628, 634, the court made this statement which is apposite: "A use of property which does not create a nuisance cannot be enjoined or a lawful structure abated merely because it renders neighboring property less valuable." *66 C. J. S. Nuisances Pg. 19(d), page 771. 39 Am. Jur. 309, Pg. 28.*

As stated, I viewed the premises and the surrounding area and it is my opinion that the area from Pet Milk Company, or the intersection of Stone Avenue By-Pass and Wade Hampton Boulevard, is and should be business. I therefore conclude that the City Council properly has rezoned the Wilson property.

In my examination of the entire record in this case in the light of the legal principles set forth by the court in the Talbot case and the other cases contained in the Master's Report, I reached the conclusion that the report of the Master should be affirmed and that all exceptions thereto should be overruled and the Complaint of the Plaintiff be dismissed and IT IS SO ORDERED.

In reaching this conclusion, I have not given any consideration to Exhibit 10 filed in the case.

Signed: JAMES HUGH MCFADDIN,
Presiding Judge.

April 2, 1963

Exception 2 to the Circuit Court Decree of April 2, 1963.

(Transcript folios 891-893)

That His Honor erred in failing to point out what testimony and what exhibits he found to be relevant and competent and what testimony and exhibits he found to be irrelevant and incompetent.

SPECIFICATIONS OF ERROR:

(a) This omission deprived appellant of its right to appeal from His Honor's rulings on those matters; and,

(b) In effect, said omission amounts to no ruling at all on the objections to the evidence, making the decision incomplete and providing no basis therefor, and the same does not accord to plaintiff:

(1) Due Process of Law; or,

(2) Equal Protection of the Laws; and,

Violates the Due Process of Law Clause and the Equal Protection of the Laws Clause, respectively, contained in Section 5, Article I, of the South Carolina State Constitution, and contained in the Fourteenth Amendment to the Constitution of the United States.

Exception 5 to the Circuit Court Decree of April 2, 1963.

(Transcript folios 898-900)

That His Honor erred in, and was influenced by, misinterpretations of the laws applicable to the case.

SPECIFICATIONS OF ERROR:

(a) In that His Honor wrongfully held that the declaring of a re-zoning ordinance to be invalid, null and void, would be zoning by the Court, and therefore it had no power to make such a declaration; and,

(b) In that His Honor wrongfully held that since zoning was an exercise of the police power, zoning ordinances were not subject to or controlled by the provisions, inhibitions, restrictions or limitations of the South Carolina State Constitution or of the United States Constitution, or the amendments thereto, thereby wrongfully denying to plaintiff consideration of its position that it was being deprived of its property without due proc-

ess of law, in violation of the Due Process of Law Clause in Article 1, Section 5, of the State Constitution, and in the Fourteenth Amendment to the Constitution of the United States, and such action, within itself, is such a deprivation.

Exception 7 to the Circuit Court Decree of April 2, 1963.

(Transcript folios 903-906)

That His Honor erred in failing to find and to hold that the re-zoning ordinance passed by the City of Greenville on July 10, 1962, by which the Wilson property was re-zoned, was invalid, null and void.

SPECIFICATIONS OF ERROR:

(d) Amounts to the taking of plaintiff's property without due process of law, in violation of the Due Process of Law Clause in Article 1, Section 5, of the South Carolina State Constitution, and of the Fourteenth Amendment to the Constitution of the United States.

Opinion and Final Judgment of

The Supreme Court of the State of South Carolina.

Case No. 5042.

Opinion No. 18139.

Filed December 11, 1963.

MOSS, A. J.: Bob Jones University, Inc., the appellant herein, owns and operates a liberal arts college in the northeastern section of the City of Greenville. The appellant owns about one hundred and fifty acres of land bounded generally by U. S. Highway No. 29, known also as Wade Hampton Boulevard; State Highway No. 291; East North Street; and White Oak Drive. There are located upon this said tract of land residences, dormitories, classrooms, and other buildings used in connection with the university.

It appears that a comprehensive zoning ordinance was adopted by the city council of the City of Greenville in 1952, pursuant to the statutory law of South Carolina, which is now codified as Sections 47-1001 to 47-1017, inclusive, 1962 Code of Laws of South Carolina. It appears that pursuant to the aforesaid comprehensive zoning ordinance the City of Greenville was divided into different zones or districts and the property with which we are here concerned, known as the Wilson property, and containing approximately sixteen acres, was zoned as "A-1 Residential." The record shows that on December 4, 1961, the Wilsons made application to the city council for the rezoning of their property and such was referred to the Planning and Zoning Commission of said city. This commission, after hearings, recommended that the Wilson property be rezoned from an A-1 residential classification to E-1 retail shopping center classification. Thereafter, the city council, after public hearings, and in the manner provided for by law, did, on July 10, 1962, adopt an ordinance whereby it rezoned certain real property situate in said city, and being a portion of the land located in the block bounded by Wade Hampton Boulevard, White Oak Drive, Beuna Vista Street and Karen Drive.

This action was instituted by the appellant for the purpose of having the court declare the rezoning ordinance null, void and of no effect, and to enjoin the City of Greenville, its City Manager and Building Commissioner, the respondents herein, from according the said rezoning ordinance any validity and from issuing any building permits thereunder.

The pleadings present for determination the validity of the ordinance of the City of Greenville undertaking to amend the comprehensive zoning ordinance by rezoning lands commonly known as the Wilson property, from a residential zone into a retail shopping center classification. Invalidity is asserted on the ground that the rezoning ordinance is arbitrary and unreasonable and in contravention of the constitution and the enabling statute empowering municipal corporations to zone and rezone property

and the adoption of such ordinances was an abuse of discretion.

This case, by agreement, was referred to the Master in Equity for Greenville County, with instructions to take the testimony and report the same to the Court with his findings of fact and conclusions of law. The Master held three references, at which voluminous testimony was taken and many exhibits were offered in evidence. The Master, on January 3, 1963, filed his report, wherein he recommended that the complaint of the appellant be dismissed and the action of the Greenville City Council, rezoning the property in question from residential to business, be upheld in every respect. The appellant filed numerous exceptions to the report of the said Master, and these exceptions are substantially the same as now presented to this Court. The appeal was heard by the Honorable James Hugh McFaddin, Presiding Judge, and, on April 12, 1963, he confirmed the report of the Master and made it the judgment of the Court. The appellant, within due time, filed notice of intention to appeal to this Court.

The Wilson property is located on the southern side of Wade Hampton Boulevard, otherwise known as U. S. Highway 29, which is a four lane divided superhighway between Greenville and Spartanburg. Just east of the Wilson property and also fronting on Wade Hampton Boulevard is the property of the appellant. However, these two properties are separated by a street known as White Oak Drive, of a width of approximately fifty feet. Just west of the Wilson property, also on Wade Hampton Boulevard, is a recently constructed shopping center referred to as Wade Hampton Shopping Center, located on a tract of land containing twelve acres. The Wilson property and the Wade Hampton Shopping Center property are separated by Karen Drive, a street fifty feet in width.

There is evidence from which it can be concluded that all of the property along Wade Hampton Boulevard, from Main Street in the City of Greenville to the appellant's property, has been zoned for business purposes, with the exception of the Wilson property and certain property a-

cross Wade Hampton Boulevard. A map in evidence shows that along Wade Hampton Boulevard and extending towards the main street of the City of Greenville, much of the property is designated as local commercial and light industrial. A further examination of this map shows that a greater portion of the property across Wade Hampton Boulevard and immediately in front of the property of the appellant is classified as local commercial. A portion of the appellant's property lying on the northeast corner and at the intersection of State Highway No. 291 with Wade Hampton Boulevard is likewise so classified. It is undisputed from the record that immediately across State Highway No. 291, which is the northeastern boundary of appellant's property, there is located the Lake Forest Shopping Center, consisting of approximately fifteen stores. However, it should be stated that this property does not lie within the corporate limits of the City of Greenville and, hence, is not subject to zoning. It further is an admitted fact that the appellant built on its own property a supermarket, which it leases as a Winn-Dixie Store. A witness for the appellant admitted that beyond its property is a Drive-In Restaurant, furniture business, a Howard Johnson Restaurant, a bank building, and a filling station, all in close proximity to Bob Jones University, and that immediately across Wade Hampton Boulevard and directly in front of appellant's property, as is heretofore stated, there are some six to eight stores of various kinds, including a large warehouse owned by a trucking company.

It appears from the record that the Planning and Zoning Commission of the City of Greenville and the city council had what is referred to as the "Hoyt Report," which had to do with a market survey made on the Wilson property; and the "Hamer Report," which was a like study made in connection with rezoning of the property now occupied by the Wade Hampton Shopping Center, and in the latter report, a re[illegible]ation was made that additional property adjacent to the tract occupied by the Wade Hampton Shopping Center be obtained for future expansion.

The appellant presented a number of witnesses who testified that the rezoning of the Wilson property would materially affect the value of the properties adjacent thereto. There was testimony in behalf of the respondents that the rezoning of the Wilson property was proper and for the best interest of the City of Greenville, and would not affect the market value of the property on the north side of Wade Hampton Boulevard. One of the witnesses for the respondents testified that the property on the northern side of Wade Hampton Boulevard had already been damaged, not by virtue of the Wade Hampton Shopping Center, or any other shopping center, but because of the commercial nature of Wade Hampton Boulevard. This witness also testified that you would have to go beyond State Highway No. 291 before you could classify property as residential, but from this highway towards the City of Greenville practically all of it was commercial property.

We have not recited all of the testimony in detail but have attempted to summarize the evidence bearing on the issues made by the pleadings.

Based upon the record, the Master concluded, "The rezoning of the land in question is for the public good, the morals, and the general welfare of the City of Greenville and its citizens," and "That to deny the rezoning of the 'Wilson property' would be unreasonable, arbitrary, and not in conformity with the general principles of zoning and the rights of a property owner." The Master also found that the area here involved has essentially changed and, as a result, the property in question should be rezoned, citing the fact that only recently there was a rezoning in order to allow the erection of a building for the First Federal Savings and Loan Association and for a filling station, both on the northern side of Wade Hampton Boulevard, and the shopping center designated as the Wade Hampton Shopping Center, immediately west of the property in question and on the southern side of Wade Hampton Boulevard.

Section 47-1001 of the Code authorizes the zoning of property within a municipality for the purpose of promot-

ing health, safety, morals and the general welfare of the community therein. Section 47-1005 authorizes municipalities to amend such regulations, restrictions and boundaries after a public hearing in the manner authorized by Section 47-1004 of the Code. Hence, a municipality has the legislative power to amend its general zoning ordinance and rezone small areas, so long as its action is not arbitrary or unreasonable. *Momeier v. John McAlister, Inc.*, 231 S. C. 526, 99 S. E. (2d) 177. In amending its zoning ordinance, as it pertains to the Wilson property, the city council has complied with all procedural requirements as are set forth in the statute law of the State and the ordinance of the city pertaining thereto. However, the appellant does raise a question with respect to the written protests and objections made by a number of residents and landowners within the area here involved. Admittedly, these protests and objections were not filed within five days before the first public hearing, as required by the ordinance of the City of Greenville. It was proper for the city council of Greenville to disregard such written protests and objections because such were not timely filed. *Central Realty Corporation v. Allison*, 218 S. C. 435, 63 S. E. (2d) 153. The record here shows that on each reading of the amendatory ordinance, the vote was six in favor of the amendment and one against it. This was more than the three-fourths of the members of the city council of Greenville, including the Mayor and six aldermen. Had the protests and objections been filed within the time allowed by the ordinance, they would have been of no avail because more than three-fourths of the council voted in favor of the amendment.

The authority of a municipality to enact zoning ordinances, restricting the use of privately owned property is founded in the police power. *Owens v. Smith*, 216 S. C. 382, 58 S. E. (2d) 332, and *James v. City of Greenville*, 227 S. C. 565, 88 S. E. (2d) 661. The governing bodies of municipalities clothed with authority to determine residential and industrial districts are better qualified by their knowledge of the situation to act upon such matters than

are the Courts, and they will not be interfered with in the exercise of their police power to accomplish desired end unless there is plain violation of the constitutional rights of citizens. There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application, and where the Planning and Zoning Commission and the city council of a municipality has acted after considering all of the facts, the Court should not disturb the finding unless such action is arbitrary, unreasonable, or in obvious abuse of its discretion, or unless it has acted illegally and in excess of its lawfully delegated authority. Likewise, the power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which will be exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations. *Talbot v. Myrtle Beach Board of Adjustment et al.*, 222 S. C. 165, 72 S. E. (2d) 66.

A municipal zoning ordinance is presumably valid. *Momeier v. John McAlister, Inc.*, 231 S. C. 526, 99 S. E. (2d) 177; *City of Florence v. Turbeville*, 239 S. C. 126, 121 S. E. (2d) 437. Hence, the burden of proof is upon the party attacking the amendment to establish that the acts of the city council were arbitrary, unreasonable and unjust. *Keller v. City of Council Bluffs*, 66 N. W. (2d) 113, 51 A. L. R. (2d) 251.

The Master has found, and such has been affirmed by the Circuit Judge, that the appellant has not sustained the burden of proof by showing that the action of the city council, in rezoning the property here in question, was arbitrary, unreasonable and unjust.

The Planning and Zoning Commission and the city council of Greenville concluded that the general welfare of the community would be advanced by reclassifying the property here in question from residential to commercial. The Master and the Circuit Judge likewise concur in such finding of fact. At the trial of the case before the Master, the appellant presented evidence which it contends shows that the rezoning of the Wilson property was arbitrary,

unreasonable and an abuse of discretion on the part of the city council. The respondents presented evidence to the contrary. The Master and the Circuit Judge have found that the action of the city council was not arbitrary, unreasonable and unjust. Under the factual findings so made, the most that can be said is that whether that determination was unreasonable, arbitrary and unjust is fairly debatable. If the validity of the classification made for zoning purposes be fairly debatable, and we think it is, the legislative judgment must be allowed to control. *Euclid v. Ambler Realty Company*, 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A. L. R. 1016.

It is the contention of the appellant that the rezoning of the Wilson property from residential to commercial constitutes "spot zoning" and, because of such, the amendatory ordinance was invalid. "Spot zoning" is a process of singling out a small parcel of land for use classification totally different from that of the surrounding area, for the benefit of owners of such property and to detriment of other owners. *Bartlett v. Middletown Township*, 51 N. J. Super. 239, 143 A. (2d) 778. It has been held that the granting of a special zoning permit extending area previously zoned for commercial use so as to embrace adjacent property zoned for residential use does not constitute spot zoning. *Neal v. City of Atlanta*, 212 Ga. 687, 94 S. E. (2d) 867. In the case of *Eckes v. Board of Zoning Appeals*, 209 Md. 432, 121 A. (2d) 249, affirming the reclassification of a tract of land containing approximately eleven acres from residential to commercial for the erection of a shopping center, the Court held that it could not be considered as spot zoning where the proposed change is from one use to another and there was already a considerable amount of property adjoining the property sought to be reclassified falling within the proposed classification. In *Putney v. Township of Abbington*, 176 Pa. Super. 463, 108 A. (2d) 134, affirming the rezoning for fifty-one acres of land from residential to commercial so that a shopping center could be built thereon, it was held that where such reclassification merely expanded an existing commercial

area, it did not constitute spot zoning, since the amendatory ordinance did no more than create a commercial area similar to one created in the basic ordinance. It was further held that the amendatory ordinance was not a departure from the comprehensive zoning plan.

We conclude that the rezoning of the property in question was not spot zoning because the property immediately to the west thereof had been rezoned so that a shopping center could be built thereon. The rezoning here merely expanded an existing commercial area.

In the recent case of *Strong v. Winn-Dixie Stores*, 240 S. C. 244, 125 S. E. (2d) 628, it was held that the Court has no power to zone property, and the right to zone is normally reserved under the police power to the legislative branches of government. In the case of *Talbot v. Myrtle Beach Board of Adjustment*, 222 S. C. 165, 72 S. E. (2d) 66, it was held that even though zoning boards are given wide discretion, its actions are subject to judicial review as to their validity.

We have carefully reviewed the entire record in this case and we think there is competent and substantial evidence to support the findings and conclusions of the Master, which were concurred in by the Circuit Judge. This Court will not disturb, on appeal, such findings unless they are without evidentiary support or are against the clear preponderance of the evidence. *Carsten v. Wilson*, 241 S. C. 516, 129 S. E. (2d) 431.

We find no merit in the contention of the appellant that the rezoning ordinance amounts to a taking of its property for a private or public use without compensation therefor, and that it has been deprived of due process and the equal protection of the laws in violation of the State and Federal Constitutions.

It is the contention of the appellant that error was committed by the Master in failing to identify and separately report the evidence he ruled incompetent from that which he ruled competent. It appears that when the taking of the testimony began, each party objected to the testimony of the other, on the ground of irrelevancy, and then

counsel for the parties, with the concurrence of the Master, agreed that all testimony offered would be subject to a standing objection.

In the Master's Report, he stated:

"I find that much testimony offered by both parties was irrelevant and incompetent. Both parties agreed that I must take all testimony, but that I had the right to consider only such testimony as I thought proper. I have done this, and, consequently, a large portion of the testimony and exhibits have been sifted as the 'chaff from the wheat.' "

The appellant asserts that under Section 10-1409 of the Code, a Master is required to rule on objection to testimony and to separately report testimony ruled incompetent from that ruled competent.

In the case of *Cox v. First Provident Corporation*, 240 S. C. 130, 125 S. E. (2d) 1, this Court cited the case of *Pack v. Katzin*, 215 N. C. 233, 1 S. E. (2d) 566, and quoted the following therefrom:

"***** The referee should enter his ruling on each objection, either at the time of taking the testimony, or subsequently, or in his report, to the end that it may be known whether the evidence objected to was considered or excluded from consideration in making his findings of fact. However, where the objections are made to a certain line of testimony, or to all testimony tending to show certain facts, it would be regarded as a compliance with this rule if the referee incorporates in his report a general statement of his rulings such as would afford the parties and the reviewing judge on exceptions filed full opportunity to consider the effect of the referee's ruling and to give proper weight to his findings from the evidence reported.*****

" 'Considering the nature and purpose of the testimony heard by the referee in this case, we are unable to say that the defendants have been prejudiced by the manner in which the referee has made his report and noted his rulings.' "

The appellant does not, by any of its exceptions, charge the Master with error in considering any testimony alleged to be incompetent or refusing to consider any testimony alleged to be competent. Neither does it specify in any exception or in its brief the particular testimony which it contends to be irrelevant or incompetent and which it claims that the Master should not have considered but may have done so to its prejudice. Nor does appellant point out any evidence offered by it which it claims that the Master should have considered but may not have done so to its prejudice. Therefore, the appellant has not met the burden of establishing that it has been prejudiced by the Master's failure to expressly rule on objections to the evidence.

All of the exceptions of the appellant are overruled and the judgment below is affirmed.

Affirmed.

TAYLOR, C. J., LEWIS and BRANSFORD, JJ., concur. BUSSEY, A. J., dissents.

BUSSEY, A. J. (dissenting): Finding myself unable to agree with the majority opinion and the result reached in this case, I feel impelled to set forth as concisely as possible my views thereabout.

The pivotal issue in this case is, not whether the City of Greenville has the right to amend its zoning ordinance, but whether here the city acted in contravention of the enabling statute, and in excess of the powers granted, in adopting the particular ordinance. The ordinance, of course, carries a presumption of validity, but voluminous evidence, both oral and documentary, tending to overcome the presumption of validity was offered on behalf of the appellant, and evidence, both documentary and oral, was offered by the respondents tending to support the validity of the particular ordinance.

The exhibits offered by the parties, not all of which were brought before us, were in excess of thirty. Much of the evidence, both oral and documentary, offered by the respective parties was objected to as being either irrelevant

or incompetent or both. The Master complied with Section 10-1409 of the Code by receiving the evidence, but did not comply with the following provision of the statute, "shall hear and decide any objection which may be made to the competency, relevancy or admissibility of any testimony which may be offered." Neither did he in any manner attempt to separate the evidence deemed by him to be inadmissible. Instead, he found as a finding of fact, rather than a conclusion of law, that "much testimony offered by both parties was irrelevant and incompetent." He went on to say that "a large portion of the testimony and exhibits have been sifted as the chaff from the wheat."

With all due respect to the esteemed Master of long judicial experience, he did not furnish the litigants, the circuit court or this court any insight into his mental processes employed in sifting the "chaff" from the "wheat." He gives no guide or even intimation whatosever as to what he determined to be "chaff" and what he determined to be "wheat," or how he arrived at such determination.

Since we are totally in the dark as to what the Master considered to be "wheat" and what the Master considered to be "chaff," I do not know how it is possible for either the circuit court or this court to determine whether his findings of fact were based upon and supported by competent, relevant evidence or not. For the appellant here to have made specific exceptions as to the consideration of inadmissible evidence or the failure by the Master to consider admissible evidence, would have involved pure speculation on the part of the appellant since it was left totally in the dark as to what evidence the Master considered and what evidence he did not consider. Had it attempted to speculate and frame specific exceptions in this respect, such exceptions could not have been supported by the record since there is nothing to show what evidence was considered and what was not considered.

We, of course, held in the cited case of *Cox v. First Provident Corp.*, 240 S. C. 130, 125 S. E. (2d) 1, that the failure of the Master to there comply with Section 10-1409 was not shown to be prejudicial. The factual situa-

tion there was, however, totally different from the case at bar, the objection there being simply to one line of questioning. The North Carolina case of *Pack v. Katzin*, 1 S. E. (2d) 566, 215 N. C. 233, is likewise totally distinguishable from the instant case on the facts. Here, the objections went to much of the evidence offered by both of the parties and we are not given even any intimation as to the Master's rulings thereabout.

Much more nearly in point, I think, is the decision of the Georgia Supreme Court in the case of *Greer v. Andrew*, 133 Ga. 193, 65 S. E. 416. There the report of the auditor was much more nearly in accord with the provisions of a similar Georgia statute than is the report of the Master here. The Supreme Court reversed the lower court decision confirming the auditor's report and refusing to recommit it for failure to comply with the statutory provisions.

It seems clear to me that the purposes of Section 10-1409 are clearly twofold: (a) The Master is required to receive evidence which he regards as inadmissible to the end that it will be unnecessary to recommit the matter for the purpose of a further reference should the reviewing court conclude that the evidence was properly admissible. (b) To require a ruling from the master as to the admissibility of evidence so as to afford the parties and the reviewing judge full opportunity to consider the effect of the referee's rulings and to give proper consideration to his findings from the evidence reported.

The decision of this court in *Elrod v. Elrod*, 94 S. E. (2d) 237, 230 S. C. 109, dealt with the first purpose of the statute, above stated, and held that it was reversible error for the master to refuse to take evidence which he deemed inadmissible. I think the second purpose of the statute is even more important than the first and that the Master committed reversible error in failing to incorporate in his report his rulings as to the admissibility of evidence. In the absence of such rulings, I do not see how the circuit court or this court could possibly intelligently review the record and determine whether the Mas-

ter's findings of fact were based on competent, relevant, admissible testimony, or to the contrary, were arrived at by the failure to consider proper evidence or possibly the consideration of inadmissible evidence. It would seem to me that we could only speculate as to the mental processes employed by the Master in separating what he termed "wheat" from what he termed "chaff."

I would reverse and remand the cause for failure of the Master to comply with the statute. Doing so would make it unnecessary to now discuss most, if not all, of the other questions involved in the appeal. With respect to other questions, however, I wish to point out that in my humble opinion the affirmance of the judgment of the lower court, in accordance with the majority opinion, leaves unanswered very serious constitutional questions as to whether the appellant here has been accorded due process of law and whether the appellant was denied the equal protection of the laws. In my view as to the proper disposition of the appeal, under the rule of restraint, it becomes unnecessary for me to discuss or attempt to decide these serious constitutional questions.

Appellant's Request for Remand taken from page 58 of Appellant Brief filed in the South Carolina State Supreme Court and on which brief the case was heard.

"Appellant asks that the Decree appealed from be reversed, that amended zoning ordinance involved be declared void, and that judgment be entered for appellant; or, if judgment for appellant is not warranted under the record in the case, that the Decree appealed from be reversed, and the case remanded to the trial court with instructions to put the record in the condition required by law, and to consider the case in the light of the correct applicable principles of law; that appellant's Exceptions be sustained, and that appellant be granted such other relief to which it may be entitled."

Final Judgment of Supreme Court of State of South Carolina, Dated and Filed December 11, 1963.

In South Carolina, the final opinion and the final decision of the South Carolina State Supreme Court serves as and constitutes the Final Judgment in the case. In the case at bar, the Majority Opinion of that Court, dated and filed December 11, 1963, became the final judgment therein. In the certificate certifying the record in this case, the Clerk of said State Supreme Court said:

> "the majority opinion of the Court being the final judgment therein."

The Majority opinion, decision and final judgment affirmed the Decree of the trial court, which is printed on pages 58-71 in this Appendix A.

APPENDIX B.

Constitution of the United States.

Fourteenth Amendment.

"nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Establishment of Judicial Department.

Article V of the Constitution of the State of South Carolina:

Section 1. "The Judicial power of this State shall be vested in a Supreme Court, in two Circuit Courts, to wit: A Court of Common Pleas having civil jurisdiction and a Court of General Sessions with criminal jurisdiction only. The General Assembly may also establish County Courts, Municipal Courts and such Courts in any or all of the Counties of this State inferior to Circuit Courts as may be deemed necessary, but none of such Courts shall ever be invested with jurisdiction to try cases of murder, manslaughter, rape or attempt to rape, arson, common law burglary, bribery or perjury; Provided, Before a County Court shall be established in any County it must be submitted to the qualified electors and a majority of those voting must vote for its establishment. Provided, further, that the General Assembly shall establish a County Court for the County of Orangeburg whose jurisdiction shall be fixed by law within the limits above provided for County Courts; the Judge of the County Court for the County of Orangeburg shall be appointed by the Governor upon recommendation of a majority of the members of the Orangeburg County Bar Association for a term of four years, who shall continue in office until his successor shall qualify, and whose compensation shall be not less than Sixty per cent of the salaries of Judges of Circuit Courts; and

upon request of the County Judge or upon petition of a majority of the members of the Orangeburg County Bar Association, the Governor may appoint special judges to preside over the Court and perform any of the duties of the office wherever there may be necessity for such appointment; provided, however, that the General Assembly may abolish or re-establish the County Court of Orangeburg County, from time to time, upon a majority vote of the qualified electors of the County."

Compensation of Justices and Judges.

Article 5 of the Constitution of the State of South Carolina:

Section 9. "The Justices of the Supreme Court and the Judges of the Circuit Courts shall not be allowed any fees or perquisites of office, and shall hold no other office of trust or profit under this State, the United States, or any other power. Their compensation during their continuance in office, and during their retirement, respectively, shall be fixed by law, and shall not be diminished during such continuance in office, or during such retirement, as the case may be."

Qualifications for Judicial Office.

Article 5, of the Constitution of the State of South Carolina:

Section 10. "No person shall be eligible to the office of Chief Justice, Associate Justice or Judge of the Circuit Court who is not at the time of his election a citizen of the United States and of this State, and has not attained the age of twenty-six years, has not been a licensed attorney at law for at least five years, and been a re ident of this State for five years next preceding his election."

Constitutional Amendments and Conventions.

Article XVI of the Constitution of the State of South Carolina:

Section 1. "Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives. If the same be agreed to by two-thirds of the members elected to each House, such amendment or amendments shall be entered on the Journals respectively, with the yeas and nays taken thereon; and the same shall be submitted to the qualified electors of the State, at the next general election thereafter for Representatives; and if a majority of the electors qualified to vote for members of the General Assembly, voting thereon, shall vote in favor of such amendment or amendments, and a majority of each branch of the next General Assembly shall, after such an election, and before another, ratify the same amendment or amendments, by yeas and nays, the same shall become part of the Constitution: Provided, That such amendment or amendments shall have been read three times, on three several days, in each House."

Section 3. "Whenever two-thirds of the members elected to each branch of the General Assembly shall think it necessary to call a Convention to revise, amend or change this Constitution, they shall recommend to the elector to vote for or against a Convention at the next election for Representatives; and if a majority of all the electors voting at said election shall have voted for a Convention, the General Assembly shall, at its next session, provide by law for calling the same; and such Convention shall consist of a number of members equal to that of the most numerous branch of the General Assembly."

Reporting Testimony.

Code of Laws of South Carolina, 1962:

Section 10-1409. "Master and referees to whom causes may be referred, whether to hear and decide the whole issues or to report upon any specific question of fact or upon the facts generally, shall hear and decide any objection which may be made to the competency, relevancy or admissibility of any testimony which may be offered. In case upon hearing such testimony the master or referee shall decide such testimony is inadmissible he shall take it, subject to such objection, but shall not incorporate such testimony so held by him inadmissible with the rest of the testimony in the body of his report but shall append it separately at the end of his report."

Actions Questioning Office Usurpation.

Code of Laws of South Carolina, 1962:

Section 10-2251. "The writ of scire facias, the writ of quo warranto and proceedings by information in the nature of quo warranto having been abolished, the remedies previously obtainable in those forms may be obtained by civil actions under the provisions of this chapter."

Section 10-2256. "An action may be brought by the Attorney General in the name of the State upon his own information or upon the complaint of any private party or by a private party interested on leave granted by a circuit judge against the parties offending in the following cases:"

"(1) When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this State or any office in a corporation, created by the authority of this State;

"(2) When any public officer, civil or military, shall have done or suffered an act, which by the

provisions of law, shall make a forfeiture of his office; or,

"(3) When any association or number of persons shall act within this State as a corporation without being duly incorporated."

Section 10-2260. "In every case the Attorney General, or circuit judge, as the case may be may require as a condition precedent to bringing such an action that satisfactory security shall be given to indemnify the State against the costs and expenses to be incurred thereby. In every case brought by the Attorney General in which such security is given the measure of compensation to be paid by such person to the Attorney General shall be left to the agreement, express or implied, of the parties."

Election of Justices.

Section 15-101, Code of Laws of South Carolina, 1962: "The Supreme Court shall consist of a Chief Justice and four associate justices, who shall be elected by a joint viva voce vote of the General Assembly for a term of ten years and shall continue in office until their successors are elected and qualified. They shall be so classified that one of them shall go out of office every two years. The successors of the Chief Justice and associate justices shall each be elected at the session of the General Assembly next preceding the expiration of their respective terms. The time for the commencement of their terms of office shall be the first day of August after their election."

Appointment of Greenville County Court Judge.

Code of Laws of South Carolina, 1962:

Section 15-642. "The term of office of the county judge shall be four years from the date of the expiration of his predecessor's term. He shall be appointed by the Governor in the following manner: On the first Tuesday in December 1954 and every four

years thereafter, the Greenville Bar Association shall assemble in the courthouse at an hour to be fixed by the president of the association, or if the association be unable to assemble on that day a meeting shall be held thereafter as quickly as possible, due notice being given by the president of the association. At such meeting the association shall select from the lawyers of the Greenville Bar Association one of their number who shall receive a majority vote of the lawyers present. His name shall be immediately transmitted to the chairman of the Greenville County legislative delegation for approval or disapproval by the delegation. The chairman of said delegation shall forthwith call the delegation to meet on the question of approval or disapproval of the nominee of the bar association. If the delegation approves the selection from the association, the chairman shall immediately transmit the name of the person so selected to the Governor for appointment and the Governor shall thereupon appoint him, his term of office commencing on the termination of the office of the Greenville County judge then in office. If the legislative delegation shall disapprove of the nominee of the bar association, the chairman of the delegation shall immediately notify the president of the bar association to this effect and said association shall be called together, on a notice of not less than two days, to select another name and transmit it to the delegation and the delegation shall act on such name as in the first instance, and so on until a judge has been selected by a majority of the bar association and approved by the Greenville County legislative delegation. The expression 'Greenville Bar Association' as used herein shall include every lawyer admitted to practice in the Supreme Court of this State who is a resident of and has an office in Greenville County for the practice of law, but shall not include attorneys who have been admitted to practice ~~but are in other lines~~ of business."

Amendatory Zoning Ordinance of the City of Greenville, South Carolina, passed July 10, 1962.

"BE IT ORDAINED BY THE MAYOR AND COUNCILMEN OF THE CITY OF GREENVILLE, SOUTH CAROLINA:

"Section 1. That the District Map adopted by the Greenville City Council on the 19th day of August, 1952, and referred to in Section 25-21 of the 1953 City Code of the City of Greenville, South Carolina, be and the same is hereby changed so that the properties herein described be changed from "A-1" single family residential and "B" two family residential zone to "E-1" shopping center zone:

"Those properties fronting on the south side of Wade Hampton Blvd., the east side of Karen Drive, and the West side of White Oak Drive which properties are more specifically identified in the assessor's block book, page 281, block 2, lots Nos. 7, 8, 9, 82, 75 and the northerly section of lot No. 13.

"It being the intent to describe and include within the "E-1" shopping center zoning district the above described properties and to exclude from this ordinance the total frontage on Buena Vista Street of the said lot No. 13 to a depth of 125 feet from the north line of Buena Vista Street, and to exclude from this ordinance that section of the said lot No. 13 fronting 200 feet on Karen Drive beginning at the north line of Buena Vista Street to a depth of 137.5 feet from the east line of Karen Drive.

"Section 2. That the Building Commissioner is hereby authorized and directed to make the change in the District Map to conform with this Ordinance.

"This ordinance shall become effective upon its passage.

"DONE, RATIFIED and PASSED by the Greenville City Council this the 10th day of July, 1962."